Supreme Court of the United States

OCTOBER TERM, 1968

No. 813

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

	Page
Docket entries	1
Index to the record on appeal in the United States Supreme Court	9
Complaint for injunction and declaratory relief filed March 11, 1968 in #68C 228	11
Exhibit A—Indictment No. 134-68 superseding Indictment No. 1224-67	16
Answer of District Attorney Thomas J. Mackell in 68 Civ. 1176	36
Answer of Attorney General Louis J. Lefkowitz in 68 Civ. 1176	38
Amended supplemental answer of defendants in 68 Civ. 1030	39
Affidavit of Paul Livoti in 68 Civ. 1030 and 68 Civ. 1176 with copies of form letters, etc.	41

Page

Motion for summary judgment under Rule 56 in 68 Civ. 1030, Samuels v. Mackell 47

Affidavit of Victor Rabinowitz in support of motion 49

Statement pursuant to General Rule 9(g) 51

Notice of Fred Fernandez joining summary judgment motion, dated May 10, 1968 52

Memorandum Opinion of Judge Frederick v.P. Bryan, dated April 9, 1968 54

Decision of Three-Judge Court, dated June 27, 1968 58

Order granting motion for leave to proceed in forma pauperis 72

Order noting probable jurisdiction 72

UNITED STATES DISTRICT COURT

Civil Docket 68 Civ. 1030

68 Civ. 1176 consolidated with this action for all purposes

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROCKWARD, URSULA VIRGINIA WEST, MILTON ELLIS

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York

For plaintiff:

RABINOWITZ, BOUDIN & STANDARD, 30 East 42nd Street, NYC 10017 (OX 7-8640)
(ELEANOR JACKSON PIEL, 36 W. 44th St., NYC 10036, MU 2-8288)

For defendant:

LOUIS J. LEFKOWITZ, Atty. Gen'l., State of NY, 80 Centre St., NYC 10013
PETER J. O'CONNOR, D.A., Queens County (for Thomas J. Mackell), 126-05 Hoover Ave., Kew Gardens, NY 11415
PETER J. O'CONNOR (For Thomas J. Mackell), 125-01 Queens Blvd., Kew Gardens, NY 11415

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed x	Clerk	3-12-68	Rabinowitz	15-	
		3-15-68	US Treas		15-
		7-15-68	Rabinowitz	5-	
J.S. 6 mailed ✓	Marshal	7-16-68	US Treas		5-
Basis of Action: Violation of the Constitutional Rights	Docket fee				
	Witness fees				
Action arose at:	Depositions				

Date	PROCEEDINGS
Mar. 12-68	Filed complaint and issued summons.
Mar. 12-68	Filed affidavit and order permitting Jonathan Miller to serve summons and complaint. Clerk.
Mar. 15-68	Filed Order to Show Cause re: 3-Judge Court, etc. Ret. 3/19/68. Herlands, J.
Mar. 15-68	Filed Memorandum in support of motion.
Mar. 15-68	Filed Affidavit of Personal Service.
Mar. 15-68	Filed summons & return, service as follows: Louis J. Lefkowitz, Atty Gen'l, State of N.Y. by M. Sattler 3-12-68 Thomas J. Mackell, D.A., Queens County by Mrs. Coogan In EDNY 3-12-68 (service made pursuant to order filed 3-12-68)
Mar. 19-68	Filed (in court) Affidavit in opposition.
Apr. 9-68	Filed MEMORANDUM OPINION #34631. Bryan, J. * * * I find that the plaintiffs have made a sufficient showing to warrant the convening of a 3-judge statutory court under 28 USC ¼.2281. I have duly notified the Chief Judge of this Circuit to this effect pur. to 28 USC P.2284. Since the case Fernandez v Mackell, 68 Civ. 1176 (transferred to this court from Eastern Dist. of N.Y.) presents the same issues as 68 Civ. 1030, the two actions are consolidated for ALL purposes. It is so ordered. (mailed notice) (Also in 68 Civ. 1176) returned to Judge
Apr. 22-68	Filed order designating Friendly, C.J., Wyatt, J. & Bryan, J. as 3 Judge Court.—Lumbard, Ch. C.J.
Apr. 24-68	Filed order—all applications of parties for temporary & final relief will be heard before the court of Three judges duly designated herein on 5-17-68 at 10:30 a.m. in Court room 1505 of this court; answers will be served & filed not later than 4-30-68; all papers & main briefs in support of applications to the three-

Date	PROCEEDINGS
	judge court will be served & filed not later than 5-6-68; all answering papers & answering briefs will be served & filed not later than 12:00 noon 5-15-68; and the parties will fully comply with Rule 25 of the Gen'l. Rules of this court.—Bryan, J.—mailed notice
Apr. 30-68	Filed deft's (Louis J. Lefkowitz, Atty. Gen'l., State of N.Y.) ANSWER, pro se
Apr. 30-68	Filed deft's (Thomas J. Mackell, D.A., Queens Cty.) ANSWER, PJO
May 6-68	Filed Plaintiffs' Memorandum in support of their motion for summary judgment.
May 6-68	Filed Motion for Summary Judgment under Rule 56 Ret. Room 1505 on 5/17/68.
May 8-68	Filed notice of hearing on 5-17-68, sent to attys. by certified mail this date
May 10-68	Filed Amended and Supplemental ANSWER of Thomas J. Mackell. (Samuels, etc. vs. Mackell) PJO'C
May 10-68	Filed Amended and Supplemental ANSWER of Thomas J. Mackel. (Fernandez vs. Mackell) PJO'C
May 15-68	Filed Defendants' Memorandum in opposition to pltf's motion for summary judgt. (Also in 68 Civ. 1176.
May 15-68	Filed Affidavit of Paul Livoti. (Also in 68 Civ. 1176).
May 15-68	Filed pltff's (Fred Fernandez, 68-1176) notice of motion for summary judgment-ret. 5-17-68 in Rm. 1605 at 10:30 A.M.
May 17-68	Before 3 Judge Court—Hearing held & concluded. Decision reserved.

Date	PROCEEDINGS
Jun. 26-68	Filed 3 Judge Court OPINION #34931—Since the complaints present no case for federal relief, the Clerk is directed to enter a judgment of dismissal, as prayed for by the State.—Friendly, C.J., Bryan, J. & Wyatt, J.—mailed notice. JUDGMENT Ent. Clerk
Jul. 15-68	Filed Notice of Motion before a 3-Judge Court (Friendly, Bryan and Wyatt,) re: Enjoin defendant.
Jul. 15-68	Filed Notice of Appeal (mailed copies) (Also in 68 Civ. 1196.)
Jul. 22-68	Filed Affidavit of Peter J. O'Connor in behalf of deft. Attorney General. ('Also in 68 Civ. 1196)
Jul. 22-68	Filed MEMO.END. on motion papers (filed 7/15/68) copy filed this day, with copy of Affid. of Peter J. O'Connor. Upon the consent of counsel for the defendants, the within motion for a stay is granted, conditioned upon the diligent prosecution of the appeal taken by plaintiffs to the Supreme Court of the U.S. Friendly, U.S.C.J., and Bryan, U.S.D.J.
Aug. 16-68	Filed order directing Clerk of this Court to transmit to the Clerk of the Supreme Court all the original papers which are the record on appeal, to be returned upon conclusion

UNITED STATES DISTRICT COURT

Civil Docket 68 Civ. 1176

FRED FERNANDEZ

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York

For plaintiff:

ELEANOR JACKSON PIEL, 36 W. 44th St., NYC. 10036 (MU 2-8288)

For defendant:

LOUIS J. LEFKOWITZ, Atty. Gen'l., State of NY, 80 Centre St., NYC 10013

PETER J. O'CONNOR, D.A., Queens County (for Thomas J. Mackell), 126-05 Hoover Ave., Kew Gardens, NY 11415

Filed cause on transfer from East. Dist. of N.Y. (68 Civ. 228)

Statistical Record	Costs
J.S. 5 mailed x	Clerk
J.S. 6 mailed	Marshal
Basis of Action: Violation of Constitutional Rights	Docket fee
	Witness fees
Action arose at:	Depositions

Date	PROCEEDINGS
Mar. 22-68	Filed papers originally filed in East. Dist. of N.Y., were this day filed; complaint, request of personal svce., order to cause, affdvt. of Sidney Baumgarten, hearing on show cause byfore Zavatt, Ch.J., order to transfer & copy of dockett sheet
	RECORD OF PROCEEDINGS SDNY
Apr. 9-68	Filed MEMORANDUM OPINION #34631. Bryan, J. * * * I find that the plaintiffs have made a sufficient showing to warrant the convening of a 3-judge statutory court under 28 USC P 2281. I have duly notified the Chief Judge of this Circuit to this effect pur. to 28 USC. P. 2284. Since the case Fernandez v Mackell, 68 Civ. 1176 (transferred to this court from Eastern Dist. of N.Y.) presents the same issues as 68 Civ. 1030, the two actions are consolidated for ALL purposes. It is so ordered. (mailed notice) Filed in 68 Civ. 1030.
Apr. 22-68	Filed order designating Friendly, C.J., Wyatt, J. & Bryan, J. as 3 Judge Court.—Lumbard, CH.C.J. (filed in 68 Civ. 1030)
Apr. 24-68	Filed order—all applications of parties for temporary & final relief will be heard before the court of three judges duly designated herein on 5-17-68 at 10:30 a.m. in Court room 1505 of the court; answers will be served & filed not later than 4-30-68; all papers & main briefs in support of applications to the three-judge court will be served & filed not later than 5-6-68; all answering papers & answering briefs will be served & filed not later than 12:00 noon 5-15-68; and the parties will fully comply with Rule 25 of the Gen'l. Rules of this court.—Bryan, J.—mailed notice (filed in 68 Civ. 1030)

Date	PROCEEDINGS
Apr. 30-68	Filed deft's (Louis J. Lefkowitz, Atty. Gen'l, State of N.Y.) ANSWER, pro se
Apr. 30-68	Filed deft's (Thomas J. Mackell, D.A., Queens Cty.) ANSWER, PJO
May 6-68	Filed Supplemental Memorandum in support of declaratory and injunctive relief.
Aug. 28-69	Filed Memorandum in support of application for a 3-judge court, with letter to Ryan, J.
	THIS CASE CONSOLIDATED WITH 68 Civ. 1030 FOR ALL PURPOSES.
	NO FURTHER ENTRIES ON THIS SHEET

UNITED STATES DISTRICT COURT

Docket 68 C 228

FRED FERNANDEZ

vs

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York

For Plaintiff:

ELEANOR JACKSON PIEL, 36 W. 44th St., N.Y. 10036 MU 2-8288

BASIS OF ACTION: Pursuant to Title 28, U.S.C. Sec. 1343 (3) 2201, etc.

SEEKS: Injunction and a Declaratory Judgment

JURY TRIAL CLAIMED ON

Date	Plaintiff'sAccount	Received	Disbursed
3-11-68	Complaint	15.00	
3-12-68	Pd. to Treas.		15.00

Filed, Mar. 22, 1968, U. S. District Court, S. D. of N. Y.

Date	FILINGS—PROCEEDINGS
3-11-68	COMPLAINT FILED. SUMMONS ISSUED, Amount Reported In Emolument Returns 1 JS 5
3-12-68	Request of personal service filed. Amount Reported In Emolument Returns 2
3-12-68	Order to show cause filed for injunction and declaratory relief and request for the convening of a thire-judge Court. (ret Mar 20, 1968), Amount Reported In Emolument Returns 3
3-20-68	Affidavit of Sidney Baumgarten filed in opposition to pltff's motion to convene a three judge court and for a temporary injunction. Amount Reported In Emolument Returns 4
3-20-68	Before ZAVATT, CH. J.—Hearing on show cause for injunction and declaratory relief, etc.—Motion granted on consent of all parties to transfer all papers to the Hon Justice Van Pelt Bryan. Judge of the Southern District of N.Y., U.S.D.C.
3-20-68	By ZAVATT, CH. J.—Motion for injunction and declaratory relief, etc. referred to Judge Frederick Van Pelt Bryan of the District Court for the Southern District of New York, with his consent and the consent of the attorneys for the respective parties. (See memorandum endorsed on back of motion papers)

UNITED STATES SUPREME COURT
WASHINGTON, D. C.

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROCKWARD, URSULA VIRGINIA WEST, and MILTON ELLIS, PLAINTIFFS-APPELLANTS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS-APPELLEES

68 Civ. 1196

FRED FERNANDEZ, PLAINTIFF-APPELLANT

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS-APPELLEES

INDEX TO THE RECORD ON APPEAL

Complaint

Affidavit and Order Permitting Jonathen Miller To Serve Summons and Complaint

Order to Show Cause

Plaintiffs' Memorandum In Support Of Motion

Summons with Affidavit of Service

Affidavit of Service of Order to Show Cause

Defendants' Affidavit in Opposition to Convening of Three-Judge Court

Memorandum Opinion

Order Designating Three-Judge Court

Order Setting Argument for May 17, 1968, and Setting Dates for Filing of Papers

INDEX TO THE RECORD ON APPEAL—Continued

Answer of D. Louis Lefkowitz

Answer of D. Thomas Mackell

Plaintiffs' Memorandum In Support of Motion for Summary Judgment

Plaintiffs' Motion for Summary Judgment

Defendants' Amended and Supplemental Answer

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment

Affidavit of Paul Livoti

Opinion of Three-Judge Court—June 26, 1968

Plaintiff's Notice of Motion for Temporary Injunction

Notice of Appeal

Affidavit of Peter O'Connor

Memorandum Endorsed on Plaintiffs' Motion for Temporary Injunction

Order Authorizing Transmission of Original Papers to Supreme Court

Affidavit and Order Permitting William Brownbill to Serve Summons and Complaint

Complaint

Affidavit of Sidney Baumgarten in Opposition to Three-Judge Court

Order to Show Cause and Reference to Judge Frederick van Pelt Bryan

Docket Sheet Eastern District (8C-228)

Answer of D. Thomas Mackell

Answer of D. Louis Lefkowitz

Supplemental Memorandum in Support of Declaratory Relief

Fred Fernandez Joinder in Motion for Summary Judgment

Memorandum in Support of Three-Judge Court and Letter

Clerk's Certificate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

68C 228

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF—
Filed March 11, 1968

Plaintiff, Fred Fernandez, by his attorney, Eleanor Jackson Piel, for his complaint, alleges:

1.) Plaintiff, Fred Fernandez, is a resident of the State of New York, County of Queens, and is a black Afro-American citizen who is interested in and participates in many activities centered about the achievement of equality and freedom for all American citizens categorized as Negroes and Puerto Ricans. In order to effectuate these purposes plaintiff has associated himself with others to engage in peaceful protest activities protected by the First and Fourteenth Amendments, including, but not limited to, participation in demonstrations, community organization rallies, discussion groups and the distribution of printed and written material in support of these views. In pursuit of these objectives, plaintiff has joined with others in exercising his rights of free speech, press and assembly, as well as the right to petition his government for a redress of his grievances and those of his fellow citizens.

2.) Defendant Thomas J. Mackell is the District Attorney for the County of Queens, City and State of New York and is a citizen of the United States and a resident of the County of Queens. He is sued herein both in his individual and official capacity.

3.) Defendant Louis J. Lefkowitz is the Attorney General for the State of New York and upon information

and belief is a resident of the County of New York, City and State of New York, and he is sued herein in both his individual and official capacity. Pursuant to § 71 of the Executive Law of the State, he is authorized to appear in support of the constitutionality of a State statute where such statute is challenged as will appear in greater particularity, *infra*.

4.) This action is brought pursuant to Title 28 U.S.C. § 1343(3) 2201, 2202 and Title 42 U.S.C. § 1983. Plaintiff seeks to enjoin enforcement of State statutes as will appear more particularly, *infra*, and requests, therefore, the convening of a three-judge Court pursuant to Title 28 U.S.C. §§ 2281 and 2284.

5.) The defendant Mackell, acting pursuant to and under the color of certain New York State statutes, to wit: former Penal Law §§ 160, 161, 163 and 580(1), has initiated a course of conduct designed to subject the plaintiff and others similarly situated to the deprivation of the rights, privileges and immunities secured to him and them by the Constitution and laws of the United States, by commencing a prosecution against him and by threatening to continue such prosecution.

6.) In support of this unlawful purpose as set forth, defendant Mackell presented certain alleged facts to the Grand Jury of the County of Queens on or about June 12, 1967, which resulted in such Grand Jury indicting the plaintiff and others with the crimes of anarchy and conspiracy to commit anarchy as well as charging him with the violation of other provisions of the Penal Law of New York (Indictment No. 1224-67).

7.) Thereafter, and on June 21, 1967, the defendant Mackell caused the plaintiff to be arrested by officers of the New York City Police Department and to be arraigned in the Supreme Court of New York State in Queens County. Defendant Mackell further, in the interests of the harassment of the plaintiff, caused him to be held on $20,000.00 bail which was a sum said defendant knew would be difficult, if not impossible, for plaintiff to secure release from on bond. In fact, only after special application in Part XXII of the Supreme Court of the State of New York, Second Department, and over the objection of

the defendant Mackell, was plaintiff able to secure his reduction of bail to $5,000.00 and his release thereon after spending approximately five weeks in custody for lack of ability to post sufficient bond.

8.) Upon the arraignment of plaintiff and thereafter, continuously, defendant Mackell issued numerous press releases and caused to have issued numerous press releases and other public statements relating to the indictment and arrest of plaintiff and others charged with him in the said indictment relating to the indictment and arrest of plaintiff which releases and statements were widely reported in newspapers, on the radio and over television throughout the State of New York and the nation. In addition, defendant Mackell sought and secured an associated attempted murder indictment against Herbert B. Ferguson and Arthur Harris, both indicted as co-defendants with plaintiff on the said anarchy and conspiracy to commit anarchy charges. The press releases of defendant Mackell which followed so mixed these two separate indictments as to lead persons to believe that plaintiff was charged with conspiracy to commit murder as well as anarchy and conspiracy to commit anarchy.

9.) On or about January 10, 1968, a demurrer to the said indictment interposed by plaintiff was sustained by the Supreme Court of New York, County of Queens and the said indictment number 1224-67 was dismissed.

10.) Prior to the notification of plaintiff's counsel of the sustaining of the demurrers, and on or about January 15, 1968, defendant Mackell, following his unlawful design, obtained from the same Grand Jury which had returned the previous indictment number 1224-67 a new and superseding indictment number 134-68 charging the plaintiff, *inter alia*, again with violation of former Penal Law §§ 160, 161, 163 and 580(1). A copy of such indictment is marked Exhibit "A" and is annexed hereto.

11.) Former sections 160, 161, 163 and 580(1) of the Penal Law of New York are void on their face and as applied to the plaintiff and to the other persons named in said indictment in that they violate the First, Fifth and Fourteenth Amendments to the Constitution of the United States, being in violation of the guarantees of free speech,

press and assembly provided in said amendments; furthermore, said statutes are vague and indefinite in violation of the guarantee of due process of law. In addition, §§ 160, 161 and 163 are unconstitutional in that these sections have been superseded by Title 18 U.S.C. § 2385 (the Smith Act), by which Congress has preempted the field of legislation in the general area covered by the aforesaid statutes of the State of New York.

12.) The purpose and effect of the aforesaid indictments and of the publicity which attended them was to inhibit the plaintiff and others in the exercise of their rights of free speech, press and assembly; to so intimidate them and others similarly situated that they would hesitate to express their views on subjects of great national importance through fear or prosecution and imprisonment for long terms of years and to cause them to cease speaking and assembling and distributing printed and written material in support of the principles which they hold dear, as set forth in paragraph 1 hereinabove, because of fear of unjust imprisonment.

13.) Unless this court restrains the operation and enforcement of these unconstitutional statutes, the plaintiff and others similarly situated, including the other persons named in the indictment, will continue to suffer immediate and irreparable injury, in that they will continue to be persecuted and will be deterred, hindered and prevented from exercising their constitutional rights.

14.) The Grand Jury which returned the aforesaid indictments was selected, drawn and summoned pursuant to former §§ 596, 609 and 661 of the Judiciary Law of the State of New York; said sections violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that they impose a monetary qualification for grand jury service and the standards which they set for jury service are subjective standards, thus vesting the County Clerk with arbitrary power in the selection of Grand Jurors.

15.) Plaintiff has had no adequate remedy at law.

WHEREFORE, plaintiff prays for the following relief:

1.) That, pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court be convened to hear and determine this proceeding;

2.) That a permanent injunction be issued, restraining the defendants, their agents, employees and all others acting in concert therewith, from enforcing former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York and from continuing the prosecutions thereunder;

3.) That a declaratory judgment be issued declaring that former sections 160, 161, 163 and 580(1) of the Penal Law are null and void on their face and, as applied to the plaintiff herein, being in violation of the United States Constitution;

4.) That a declaratory judgment be issued declaring that former sections 596, 609 and 661 of the Judiciary Law are null and void on their face and as applied to the indictment of the plaintiff herein, being in violation of the United States Constitution;

5.) That, pending the hearing and determination of the requests for permanent relief, an interlocutory injunction be issued restraining the defendant, his agents and employees and all others acting in concert therewith from prosecuting the plaintiff and from enforcing or attempting to enforce in any way the provisions of former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York; and

6.) For such other and further relief which to this court may seem just and proper in the premises.

ELEANOR JACKSON PIEL
Attorney for Plaintiff
Office and P. O. Address
36 West 44th Street
New York, New York 10036

[*Duly sworn to by Fred Fernandez jurat omitted in printing (all in italics)*]

EXHIBIT A TO COMPLAINT

SUPREME COURT : CRIMINAL TERM
QUEENS COUNTY

No. 134-68

Indictment Superseding No. 1224-67

THE PEOPLE OF THE STATE OF NEW YORK

—against—

MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, FRED HERNANDEZ, ARTHUR HARRIS, AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, MANDOLA MCPHERSON, HARRIET NOEL, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, RAYMOND SMITH, MAX STANFORD, a/k/a Maxwell Curtis Stanford, MERLE STEWART, ABRAHAM C. TAYLOR, URSULA VIRGINIA WEST, DEFENDANTS

INDICTMENT FOR:

Advocacy of Criminal Anarchy as to All Defendants,
Conspiracy to Commit the Crime of Advocacy of Criminal Anarchy as to All Defendants.

Conspiracy to Commit the Crime of Arson in the Third Degree as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Fred Fernandez, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Raymond Smith and Abraham C. Taylor.

Permitting Premises to be Used for Assemblages of Anarchists as to Merle Stewart and George Samuels.

Possession of Weapons and Dangerous Instruments and Appliances as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Arthur Harris, Al Haynes, a/k/a Edward Albert Haynes, Michelle Kaurouma, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Merle Stewart and Abraham C. Taylor.

FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law § 160 and § 161 subdivision 1, as added by chapter 371 § 1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally advocate by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdiviisons and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished.

SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law § 160 and § 161 subdivision 2, as added by chapter 371 § 1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally print, publish, edit, issue, circulate, distribute and display certain papers and documents entitled,

"Total Resistance", "Community Self Defense", "The Struggle for Black State Power in the U. S." and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished.

THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law § 160 and § 161 subdivision 4, as added by chapter 371 § 1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally organize and help to organize and become a member of and voluntarily assemble with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished.

FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Conspiracy as a misdemeanor, contrary to former penal law § 580, subdivision 1, as amended by chapter 893, § 6 of the laws of 1957, and chapter 611, § 1 of the laws of 1959, to commit a crime other than illegally selling narcotics or extortion, to wit: the crime of advocacy of criminal anarchy, contrary to the former penal law, § 161, subdivisions 1, 2 and 4, as added by chapter 371, § 1 of the laws of 1902, in that the said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to advocate criminal anarchy, by the following means, among others: by advocating by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; by printing, publishing, editing, issuing, circulating, distributing and displaying certain papers and documents entitled, "Total Resistance", "Community Self Defense", "The Struggle for Black State Power in the U. S." and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and

violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means; and by organizing and helping to organize and becoming a member of and voluntarily assembling with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; all with the further intent that said acts be presently attempted and accomplished.

OVERT ACTS

In furtherance of said conspiracy, the following acts beside such agreement were done to effect the object thereof by one or more of the parties to such agreement:

In order to effect the object thereof under subdivision 1, § 161 of the former penal law:

1. On or about the 5th day of October, 1965, the defendants HERMAN BENJAMIN FERGUSON and MILTON ELLIS, a/k/a Clarence Milton Ellis, and others known to the grand jury, discussed the importance of being proficient in terror tactics.

2. On or about the 9th day of December, 1965, the defendants acting in concert formed a certain gun club to be used as a cover and front for the possession of pistols and rifles.

3. On or about and between the 1st day of October, 1965 and the 21st day of June, 1967, the defendants acting in concert obtained rifles, shotguns and pistols.

4. On or about the 15th day of February, 1966, the defendants MILTON ELLIS, a/k/a Clarence Milton Ellis,

HERMAN BENJAMIN FERGUSON and HAMPTON WOODWARD ROOKARD, and others known to the grand jury, discussed the use of pipes and gunpowder for the making of bombs.

5. On or about the 12th day of July, 1966, the defendants ABRAHAM C. TAYLOR, MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, HAMPTON WOODWARD ROOKARD, an others known to the grand jury discussed tactics to be used in guerrila warfare.

6. On or about the 5th day of May, 1967, the defendants, acting in concert, obtained and possessed in the county of Queens an indeterminate amount of gun powder for making explosives.

7. On or about the 5th day of May, 1967, the defendants acting in concert, obtained and stored cans of gasoline.

In order to effect the object thereof under subdivision 2, § 161 of the former penal law:

8. On or about the 7th day of June, 1966, the defendant MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON and MERLE STEWART discussed the printing of literature on how to launch an explosive with a rifle.

9. On or about the 9th day of July, 1966, the defendants MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON and MERLE STEWART discussed the printing of literature on how to disable Police Cars.

10. On or about the 13th day of September, 1966, the defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, and others known to the grand jury, prepared and discussed a "Community Self Defense" leaflet.

11. On or about the 23rd day of April, 1967, the defendants distributed literature "The Struggle for Black State Power in the U. S."

In order to effect the object thereof under subdivision 4, § 161 of the former penal law:

12. On or about the 12th day of July, 1966, the defendants MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, ABRAHAM C. TAYLOR and URSULA VIRGINIA WEST met and discussed tactics on Guerrilla Warfare.

13. On or about the 13th day of September, 1966, the defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS and URSULA VIRGINIA WEST met and discussed "Community Self Defense" leaflets.

14. On or about the 20th day of September, 1966, the defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, MERLE STEWART and URSULA VIRGINIA WEST met and discussed literature "The Struggle for Black State Power in the U. S."

15. On or about the 4th day of April, 1967, the defendants HERMAN BENJAMIN FERGUSON, FRED FERNANDEZ, ARTHUR HARRIS, RAYMOND SMITH and ABRAHAM C. TAYLOR met and discussed organizing the youth for acts of violence in Queens County.

16. On or about the 22nd of January, 1967, the defendants AL HAYNES a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, HARRIET NOEL and MAX STANFORD, a/k/a Maxwell Curtis Stanford, met and discussed the use of the Black Guard to take care of Traitors and Uncle Toms.

17. On or about the 12th day of February, 1967, the defendants MICHELLE KAUROUMA, HARRIET NOEL and others met and discussed the use of disguise kits in terror tactics.

18. On or about the 16th day of April, 1967, the defendants AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, and HARRIET NOEL met and discussed the group's role as revolutionaries.

19. On or about the 23rd day of April, 1967, the defendants AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, HARRIET NOEL and MAX STANFORD, a/k/a Maxwell Curtis Stanford, met and discussed the literature, "The Struggle for Black State Power in the U. S."

FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, FRED FERNANDEZ, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, RAYMOND SMITH and ABRAHAM C. TAYLOR of the following crime: Conspiracy as a felony, contrary to the former penal law § 580-a., as added by chapter 611 § 2, of the laws of 1959, to commit the crime of arson, to wit: the crime of arson in the third degree, contrary to the former penal law, § 223, as amended by chapter 154 of the laws of 1913 and chapter 895 of the laws of 1936, in that the said persons aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to wilfully burn and set on fire certain public transportation facilities and certain premises used for storage of tires and lumber, all located in the county of Queens, by use of ignited gasoline and other incendiary means.

OVERT ACTS:

In furtherance of said conspiracy, the following acts beside the agreement to commit such crime were done to effect the object of the agreement by one or more of such persons:

1. On or about the 26th day of April, 1967, the defendants HERMAN BENJAMIN FERGUSON and AR-

THUR HARRIS marked the locations of two lumber yards and tire company on a Queens map.

2. On or about the 26th day of April, 1967, the defendants HERMAN BENJAMIN FERGUSON and ARTHUR HARRIS went to the vicinity of Sutphin Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a lumber yard.

3. On or about the 29th day of April, 1967, the defendant ARTHUR HARRIS went to the vicinity of New York Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a tire company.

4. On or about the 5th day of May, 1967, the defendants, acting in concert, in the County of Queens, obtained and stored cans of gasoline.

5. On or about the 5th day of May, 1967, the defendants, acting in concert, obtained and stored an indeterminate amount of gun powder.

SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Permitting premises, to be used for assemblages of anarchists, contrary to the former penal law, § 163, as added by chapter 371, § 1, of the laws of 1902, in that the said person aforenamed, on or about and between the 1st day of June, 1966 and the 21st day of June, 1967, in the county of Queens, as owner, agent, tenant or occupant, did wilfully, knowingly and intentionally permit in premises located at number 120-03 New York Boulevard, an assemblage of persons assembled for the purpose of advocating and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence.

SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Permitting premises to be used for assemblages of anarchists, contrary to the former penal law,

§ 163, as added by chapter 371, § 1, of the laws of 1902, in that the said person aforenamed, on or about and between the 1st day of June, 1966 and the 21st day of June, 1967, in the county of Queens, as owner, agent, tenant or occupant, did wilfully, knowingly and intentionally permit in premises located at number 111-29 179th Place, an assemblage of persons assembled for the purpose of advocating and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence.

EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 434047; model number X15, contrary to former penal law § 1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

NINTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one rifle; serial number P4230; model number 1915; manufacturer; Bresca; description: brown cover contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 12 gauge double barrell shotgun; manufacturer: National Arms Company; police department city of New York serial number A44662, contrary to former penal

law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

ELEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 21002; manufacturer: Savage; description: brown case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWELFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; model number DM 15; manufacturer: Remington; contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 7.65 calibre pistol; serial number 768C73; manufacturer: Barreta, contrary to former penal law § 1897, subdivision 2, as amended by chapter 136 of the laws of 1963.

FOURTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 74718; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FIFTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; model number 120A; manufacturer: Springfield; description: .22 calibre scope, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

SIXTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.5 calibre rifle; serial number A57027; manufacturer: Italian; description: brown case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

SEVENTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one shotgun; serial number 68521; manufacturer: Stevens, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

EIGHTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 14245; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

NINETEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 16747; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTIETH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 24903; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and applicances, to wit, one .22 calibre rifle; serial number 26448; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 5718214; manufacturer: H&R; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 1102168; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 2511161; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 2016256; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 1022954; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FER-

GUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one Eagle carbine rifle; serial number 25135 contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 434015; manufacturer: Galesi, contrary to former penal law § 1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

TWENTY-NINTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 74089; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTIETH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre rifle; serial number 4102779 contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one eagle carbine rifle; serial number 25068 contrary to former penal law § 1897,

subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse AL HAYNES, a/k/a Edward Albert Haynes of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 25439B; model X15, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MICHELLE KAUROUMA of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 78096; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MANDOLA McPHERSON of the following crime: Possession of weapons and dangerous instrument and appliances, to wit, one .22 calibre rifle; model number 81DL; manufacturer: Marlin; description: scope, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one rifle .22 calibre, serial number 6329, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre Remington rifle, serial number 141408, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30-.30 Marlin rifle, serial number P12648 contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre Winchester rifle, serial number 114163D, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-NINTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one Noble double barrel shotgun, AB 18013, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTIETH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD, of the following crime: Possession of weap-

ons and dangerous instruments and appliances, to wit, one rifle: Stevens model 87; .22 calibre, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 503917; manufacturer: Winchester, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 95232; manufacturer: Reck, contrary to former penal law § 1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

FORTY-THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one New England West. rifle; serial number 683459, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; manufacturer: Marlin, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one zip gun; antenna barrel bound in black plastic tape; police department, city of New York, serial number 36071, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one zip gun antenna barrel bound in black plastic tape; police department, city of New York, serial number 36072, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 71387; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ABRAHAM C. TAYLOR of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one carbine rifle; serial number 4070, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

/s/ Thomas J. Mackell
District Attorney

No. 134-68

Superseding Indictment No. 1224-67

Bond

Filed day of 19

Pleading

SUPREME COURT : CRIMINAL TERM
QUEENS COUNTY

THE PEOPLE

vs.

MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, FRED HERNANDEZ, ARTHUR HARRIS, AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, MANDOLA MCPHERSON, HARRIET NOEL, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, RAYMOND SMITH, MAX STANFORD, a/k/a Maxwell Curtis Stanford, MERLE STEWART, ABRAHAM C. TAYLOR, URSULA VIRGINIA WEST, DEFENDANTS

THOMAS J. MACKELL,
District Attorney.

INDICTMENT FOR:

Advocacy of Criminal Anarchy as to All Defendants,
Conspiracy to Commit the Crime of Advocacy of Criminal Anarchy as to All Defendants.

Conspiracy to Commit the Crime of Arson in the Third Degree as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Fred Fernandez, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Raymond Smith and Abraham C. Taylor.

Permitting Premises to be Used for Assemblages of Anarchists as to Merle Stewart and George Samuels.

Possession of Weapons and Dangerous Instruments and Appliances as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Arthur Harris, Al Haynes, a/k/a Edward Albert Haynes, Michelle Kaurouma, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Merle Stewart and Abraham C. Taylor.

A TRUE BILL
Foreman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1176

Received April 30, 1968, By Mail

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

ANSWER

Thomas J. Mackell, District Attorney of Queens County, defendant, by Peter J. O'Connor, his attorney, as and for an answer alleges:

1. Denies each and every allegation contained in the complaint in paragraphs numbered 4, 5, 11, 12, 13, 14 and 15.

2. Denies knowledge and information sufficient to form a belief as to the allegations contained in paragraph 1 of the complaint.

3. Denies each and every allegation contained in the complaint in paragraph 6 except admits that on or about June 12, 1967 a grand jury in the county of Queens indicted the plaintiff and others.

4. Denies each and every allegation contained in the complaint in paragraph 7 thereof except admits that on June 21, 1967 the plaintiff herein was arrested by officers of the New York City Police Department.

5. Denies each and every allegation contained in the complaint in paragraph 8 except denies knowledge or information sufficient to form a belief as to those allegations relating to the reportage of the circumstances herein over radio and television throughout the state of New York and the nation and admits that a press release was issued with respect to the arrest of the said plaintiff and others.

6. Denies each and every allegation contained in the complaint in paragraph 10 except admits that on or about January 15, 1968 the aforesaid grand jury found a superseding indictment, number 134-68.

WHEREFORE the defendant Thomas J. Mackell respectfully prays for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

PETER J. O'CONNOR
Attorney for Defendant
Thomas J. Mackell
125-01 Queens Boulevard
Kew Gardens, New York 11415

By /s/ Peter J. O'Connor

[*Duly sworn to by Peter J. O'Connor jurat omitted in printing (all in italics)*]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1176

Received April 30, 1968, By Mail

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

ANSWER

Louis J. Lefkowitz, Attorney General for the State of New York, defendant herein, appearing pro se, as and for his answer, respectfully alleges:

1. Denies each and every allegation contained in the complaint in paragraphs numbered 4, 5, 11, 12, 13, 14 and 15.

2. Denies knowledge and information sufficient to form a belief as to the allegations contained in paragraph 1 of the complaint.

3. Denies each and every allegation contained in the complaint in paragraph 6 except admits that on or about June 12, 1967 a grand jury in the county of Queens indicted the plaintiff and others.

4. Denies each and every allegation contained in the complaint in paragraph 7 thereof except admits that on June 21, 1967 the plaintiff herein was arrested by officers of the New York City Police Department.

5. Denies each and every allegation contained in the complaint in paragraph 8 except denies knowledge or information sufficient to form a belief as to those allegations relating to the reportage of the circumstances herein over radio and television throughout the state of New York and the nation and admits that a press release was issued with respect to the arrest of the said plaintiff and others.

6. Denies each and every allegation contained in the

complaint in paragraph 10 except admits that on or about January 15, 1968 the aforesaid grand jury found a superseding indictment, number 134-68.

WHEREFORE the defendant Louis J. Lefkowitz respectfully prays for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Appearing pro se
80 Centre Street
New York, New York

By /s/ Mortimer J. Sattler
MORTIMER J. SATTLER
Asst. Atty. Gen.

[*Duly sworn to by Mortimer J. Sattler jurat omitted in printing (all in italics)*]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

AMENDED SUPPLEMENTAL ANSWER

Thomas J. Mackell, District Attorney of Queens County, defendant, by Peter J. O'Connor, his attorney, and Louis

J. Lefkowitz, Attorney General of the State of New York, defendant, appearing pro se, as and for an amended supplemental answer allege:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

Paragraph 5: The system of selecting grand jurors in the County of Queens is non-discriminatory.

Paragraph 6: All citizens in the County of Queens over the age of 21 and not disqualified by reason of mental or physical disability are eligible to serve as grand or petit jurors.

Paragraph 7: There is no class of citizens in the County of Queens who are discriminated against insofar as jury service is concerned by the terms of the statute.

WHEREFORE the defendants Thomas J. Mackell and Louis J. Lefkowitz respectfully pray for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

PETER J. O'CONNOR
Attorney for Defendant
Thomas J. Mackell
125-01 Queens Boulevard
Kew Gardens, New York 11415

By .....
LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
80 Centre Street
New York, New York

By .....
MORTIMER SATTLER
Assistant Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

Received by Mail May 16, 1968

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

68 Civ. 1176

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

AFFIDAVIT OF PAUL LIVOTI

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

I, PAUL LIVOTI, being duly sworn, depose and say:

1. I am the County Clerk of the County of Queens, State of New York and have been such since 1938.

2. As the Clerk of Queens County, it is my duty to provide jurors for the trial of all cases requiring jury service in Queens County.

3. In pursuance of such duty it has always been my practice to obtain jurors, both petit and grand, from the list of registered voters of Queens County.

4. In order to procure as broad-based a representation as possible, various plans have been experimented with and employed. For instance, at one time, selections were made from two or three non-contiguous assembly districts on an annual basis. This was not found to be altogether satisfactory because of problems arising out of the tendency of ethnic groups to localize themselves. Today we cover the entire County by taking each tenth election district from each assembly district. This procedure takes six to seven years to cover every registered male voter in the County. This I have found offers the best possibility of obtaining the most diversified collection of prospective jurors, representative of all ethnic groups in the entire County.

5. I estimate that annually, in order to supply the needs of Queens County, approximately 60,000 prospective jurors are summoned for examination and service. From this amount there is normal attrition consisting of removals, exempts, physically disabled and those who, for legal excuses obtain relief from service.

6. These approximately 60,000 prospective jurors are required to present themselves at my office in order to satisfactorily qualify. Among the questions formerly put to each, until the recent change in the law, is the one which I am advised is the main contention raised in the instant attack upon the former statute, namely, whether or not the prospective juror is the possessor of two hundred and fifty dollars ($250.00) in real or personal property. I state on information and belief that in my 30 years experience interviewing the aforesaid number each year there has never been a single individual responding by subpoena who has been rejected or disqualified from service as a trial or grand juror solely by reason of not having the aforesaid sum, either in real or personal property. There has been, in the past, out of this huge number, perhaps a few instances where an individual might have said that he lacked that sum. But when he was asked whether he considered the value of his personal property, such as clothing, household equipment and all other types of personal possessions, it became apparent to him that he was the possessor of that amount and in each case he was accepted as a prospective juror.

7. The list of grand jurors which has been maintained at 750 but is now required to be maintained at 1500 by January 1, 1969, is obtained from the list of trial jurors who have been accepted for service as such, the great majority of whom have already served. The requirements for grand jury service are no different generally from those of a trial juror except that each grand juror is required to state that he has no objection to the death penalty as now provided by law. Furthermore, each juror is advised and he must state that he has no objection to the Fifth Amendment and must have no prejudice against any law which would prevent finding a defendant guilty of violation of such law.

8. Of course, certain trial jurors are prohibited from acting as grand jurors. Reference is made specifically to city, county, state and federal employees.

9. It is my intention and purpose, just as in the case of trial jurors, to make the scope of the list of grand jurors as broad as possible in terms of county distribution. In this regard, I wish to inform this Court that I have made great efforts and still do to invite responsible individuals from all elements of Queens County society.

10. Annexed hereto are copies of form letters employed by me in connection with means of acquiring the services of prospective grand jurors. In preparation for the 1969 grand juror list, starting in the middle of February up to today, more than 3,000 invitations have been mailed to trial jurors and about 400 have accepted.

/s/ Paul Livoti

Sworn to before me this
13th day of May, 1968.

/s/ Joseph A. Hetterich
JOSEPH A. HETTERICH
Notary Public, State of New York
No. 41-1782600
Qualified in Queens County
Commission Expires March 30, 1969

[SEAL]

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE

Sutphin Boulevard and 88th Avenue
Jamaica, N. Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Your request to be considered for Grand Jury Service has been placed on file.

The annual list according to law must be prepared well in advance. Inasmuch as we have many more pending applications, it will be impossible to tell when you may be called to this office for examination and qualification.

However, as vacancies occur the new applicants will be notified.

I thank you for indicating to us your civic interest in our community.

Very truly yours,

/s/ Paul Livoti
County Clerk.

PL:fg

135

[SEAL]

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE

Sutphin Boulevard and 88th Avenue
Jamaica, N. Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Dear Sir, Madam:

Your name has come to our attention for possible Grand Jury Service.

The list for next year is now being prepared and twenty-three (23) persons will be selected for service each month. A Grand Juror is called upon to serve usually about two days a week for one month.

If you are now a resident of this county, under seventy years of age, physically fit, and have made no previous application for Grand Jury service in this county, you are invited to call at this office on or before
between 9 A.M. and 12 Noon (except Saturday) to fill out the required questionnaire and to be fingerprinted.

County, City, State and Federal employees are not eligible.

Very truly yours,

County Clerk.

P.S. Please present this letter when calling to qualify.

/s/ P. L.

7

[SEAL]

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE

Sutphin Boulevard and 88th Avenue
Jamaica, N. Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Sometime ago you expressed a desire to volunteer for Grand Jury Service.

If you are still interested and not more than 72 years old, you may personally call at this office on or before between the hours of 9 A.M. and 12 Noon (except Saturday) to fill out the required questionnaire and to be fingerprinted.

Very truly yours,

County Clerk.

P.S. Please present this letter when calling to qualify.

County, City, State or Federal employees are by law not eligible.

/s/ P. L.

131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

MOTION FOR SUMMARY JUDGMENT UNDER RULE 56—
May 6, 1968

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Victor Rabinowitz, duly sworn to the 6th day of May, 1968, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this court on the 17th day of May, 1968, at the Courthouse thereof, Foley Square, Room 1505, at 10:30 o'clock in the forenoon, for summary judgment against the defendants pursuant to Rule 56 of the Rules of Civil Procedure:

1. Permanently enjoining the defendants, their agents, employees and all others acting in concert with them from enforcing former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York and from continuing the prosecutions of plaintiffs thereunder;

2. Permanently enjoining the defendants, their agents, employees and all others acting in concert with them from continuing to prosecute the plaintiffs herein under the First, Second, Third, Fourth, Sixth and Seventh counts of the indictment, a copy of which is annexed to the complaint herein.

3. Declaring former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York to be null and void on their face and as applied to the defendants herein, on the ground that they are in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and further on the ground that they have been superseded by the Smith Act, 18 U.S.C. § 2385.

4. Declaring former sections 596 and 609 of the Judiciary Law of the State of New York to be null and void on their face and as applied to the indictment of the plaintiffs herein, being in violation of the Fourteenth Amendment to the Constitution of the United States.

5. Directing such other and further relief as to the court may seem just and proper.

Dated, New York, N. Y., May 6, 1968

RABINOWITZ & BOUDIN
Attorneys for Plaintiffs
30 East 42nd Street
New York, N. Y. 10017

TO: Louis J. Lefkowitz
Attorney General, Defendant
80 Centre Street
New York, N. Y.

Peter J. O'Connor and Sidney Baumgarten
Attorneys for Defendant
Criminal Court
125-01 Queens Boulevard
Kew Gardens, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Victor Rabinowitz, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the above matter and make this affidavit in support of a motion under Rule 56 of the Federal Rules of Civil Procedure for summary judgment permanently enjoining the prosecution of the plaintiffs for criminal anarchy, declaring the Criminal Anarchy Law of New York to be unconstitutional and further declaring former sections 569 and 609 of the Judiciary Law of the State of New York to be null and void.

There is now pending before this court a motion for a preliminary injunction against the prosecution of plaintiffs. All of the papers heretofore submitted to the court on that motion are incorporated herein by reference.

This motion is made because it appears that there are no issues of fact which need be tried and that the issues on the motion for a preliminary injunction and those on the motion for summary judgment granting final relief

will be substantially identical. Much time and effort on the part both of the court and the parties will therefore be saved if the court considers the proceeding on the merits at the present time.

There are no facts in dispute in this proceeding. The only allegations of the complaint which have been denied are those allegations which are conclusory, such as paragraph 4 of the complaint, which sets forth the grounds of the jurisdiction of this court and the several paragraphs of the complaint which assert that the statutes upon which the Queens prosecution is based are unconstitutional. The only issue of significance in this proceeding is a legal issue.

WHEREFORE, plaintiffs pray judgment as set forth in the notice of motion.

/s/ Victor Rabinowitz

Sworn to before me this
6th day of May, 1968

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

STATEMENT PURSUANT TO GENERAL RULE 9(G)

Plaintiffs contend that there is no general issue to be tried as to the following facts:

1. Plaintiffs are black citizens of the United States and residents of the State of New York.
2. Defendant Thomas J. Mackell is District Attorney for the County of Queens in the City and State of New York.
3. Defendant Louis J. Lefkowitz is Attorney General of the State of New York with power and duty to appear in litigation in which a question of constitutionality of a state statute is raised.
4. On or about June 12, 1967, the Grand Jury of Queens County found an indictment against the plaintiffs and others charging them with violation of former sections 160, 161, 163 and 580(1) of the Penal Law of New York.
5. Thereafter the defendant Mackell caused the plaintiffs and others named in the indictment to be arrested and to be arraigned in the Supreme Court of the State of New York in Queens County.
6. Upon the arraignment of said plaintiffs, the defendant Mackell issued numerous press releases and other

public statements relating to the indictment and the rest of the plaintiffs, which releases and statements were widely reported in newspapers throughout the State of New York.

7. Thereafter and on or about January 10, 1968, demurrers to certain counts of the indictment were sustained by the Supreme Court of the State of New York, County of Queens, and the indictment was dismissed.

8. On or about January 17, 1968, the Grand Jury of Queens County found a superseding indictment bearing No. 134-68.

9. That the indictment attached to the complaint is an accurate copy of said superseding indictment.

10. The Grand Jury which returned the aforesaid indictment was selected, drawn and summoned pursuant to sections 596 and 609 of the Judiciary Law of the State of New York.

RABINOWITZ & BOUDIN
Attorneys for Plaintiffs
30 East 42nd Street
New York, N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

SIRS:

PLEASE TAKE NOTICE that the plaintiff, Fred Fernandez, joins in that certain motion for summary judgment dated May 6, 1968, filed by Rabinowitz, Boudin & Standard on behalf of George Samuels and others in

action number 68 Civ. 1030; and will so move this court on the 17th day of May, 1968, at the Courthouse thereof, Foley Square, Room 1605 at 10:30 o'clock in the forenoon for such relief against the defendants pursuant to Rule 56 of the Rules of Civil Procedure on all the grounds stated in that motion and its supporting papers and for the reasons stated in memoranda and papers filed herein.

Dated: New York, New York
May 10, 1968

/s/ ELEANOR JACKSON PIEL
ELEANOR JACKSON PIEL
Attorney for Plaintiff

To: Louis J. Lefkowitz
Attorney General of the
State of New York
80 Centre Street
New York, New York

Thomas J. Mackell
District Attorney
County of Queens
126-05 Hoover Avenue
Kew Gardens, New York

RABINOWITZ, BOUDIN & STANDARD
Attorneys for Plaintiff Samuels
30 East 42nd Street
New York, New York

"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

68 Civ. 1176

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

MEMORANDUM OPINION
OF JUDGE FREDERICK V.P. BRYAN—April 9, 1968

"BRYAN, District Judge:

"The eleven plaintiffs in these two actions are under indictment in the New York Supreme Court, Queens County, for, among other crimes, advocacy of criminal anarchy, conspiracy to commit criminal anarchy and permitting premises to be used for assemblages of anarchists under former New York Penal Code Sections 160, 161 and 163.[1]

[1] The criminal anarchy laws under which the plaintiffs were indicted have been superseded by Section 240.15 of the new Penal Law.

These actions in which the District Attorney of Queens County and the New York Attorney General are named as defendants, seek judgments declaring that the New York criminal anarchy laws under which plaintiffs were indicted and New York statutes governing selection of the members of the grand jury which indicted them, are unconstitutional. They ask for a permanent injunction against further prosecution of these charges or enforcement of the criminal anarchy statutes and preliminary injunctive relief to the same effect. Pursuant to 28 U.S.C. § 2281, plaintiffs request that their application be heard by a District Court of three judges designated pursuant to 28 U.S.C. § 2284.

Plaintiffs claim that the New York criminal anarchy laws are unconstitutional on their face and as applied in that they curtail First Amendment freedoms of speech, press and assembly and are unconstitutionally vague in violation of the Fifth and Fourteenth Amendments. It is alleged that these laws were superseded by the Smith Act, 18 U.S.C. § 2385 and are unconstitutional for that reason also.

The plaintiffs also claim that the grand jury which indicted them was unconstitutionally drawn. They challenge on Fifth and Fourteenth Amendment grounds the requirements of § 596 of the New York Judiciary Law that a grand juror must 'be the owner of real or personal property of the value of two hundred and fifty dollars' [2] and must 'be intelligent, of sound mind and good character, well informed; able to read and write the English language understandably.' Section 609 and 661, which contain allegedly subjective criteria for the selection of grand jurors [3] are also attacked.

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[2] The requirement of property ownership is no longer in force, having been omitted by amendments to Sections 596 and 661, effective September 1, 1967. When the indictment against the plaintiffs was drawn, the property requirement was in effect.

[3] Section 609(1) requires investigation by the County Clerk of potential grand jurors. Section 661 provides for questionnaires to be filled out by prospective grand jurors, and, prior to September 1, 1967, it specifically provided for questions as to the two hundred and fifty dollars property requirement.

The sole issue before me at this time is whether the plaintiffs have raised substantial constitutional questions requiring a three-judge court to be designated to hear the application on the merits.

This case involves the question of whether the criminal anarchy laws of New York violate the First, Fifth and Fourteenth Amendments to the Constitution, and in my view this question is substantial. See, e.g., Harris v. Younger, —— F. Supp. —— (C.D. Cal., Mar. 11, 1968) (three-judge court); Ware v. Nichols, 266 F. Supp. 564 (d. Miss. 1967) (three-judge court). Although the Supreme Court held in Gitlow v. New York, 269 U.S. 652 (1921) that a conviction under Sections 160 and 161 for mere advocacy of criminal anarchy was constitutional, it is clear from subsequent Supreme Court decisions that *Gitlow*, though never expressly overruled, is no longer the law. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951). In such circumstances, reconsideration of the constitutionality of these provisions by a three-judge court is not foreclosed. See Harris v. Younger, *supra*.

The recent reinterpretation of the criminal anarchy laws by the New York Court of Appeals in People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1967), cert. denied and appeal dismissed sub nom Epton v. New York, 390 U.S. 29 (1968) (per curiam), does not alter this conclusion. The effect of the *Epton* case upon the plaintiffs' claims has not been considered on the merits by the Supreme Court or by the courts of this circuit.[4]

It also appears that the Fifth and Fourteenth Amendment issues raised with respect to the New York Grand Jury statutes may not be insubstantial. It may be noted in this connection that the Court of Appeals of this cir-

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[4] The Supreme Court dismissed the appeal in Epton for want of a substantial federal question. This disposition is not decisive here since in that case Epton was sentenced to serve three concurrent terms, only two of which brought the anarchy statutes into question. See Epton v. New York, 390 U.S. at 29-30 (concurring opinion). See also id. at 30-35 (dissenting opinion.)

cuit in Chestnut v. New York, 370 F. 2d 1 (2d Cir. 1966), specifically left open the constitutionality of Sections 596 and 609, and characterized these constitutional issues as 'very serious' ones. 370 F. 2d at 7.

Defendants argue that the abstention doctrine should be applied in this case. With respect to plaintiffs' attack on the criminal anarchy statutes, the recent decision in Zwickler v. Koota, 389 U.S. 241 (1967), indicates that abstention may not be appropriate. In any event the question of abstention under the circumstances here is one to be determined by the three-judge court and not by the District Court to whom the application is originally made.

In short, I find that the plaintiffs have made a sufficient showing to warrant the convening of a three-judge statutory court under 28 U.S.C. § 2281.

I have duly notified the Chief Judge of this Circuit to this effect pursuant to 28 U.S.C. § 2284.

There is one further detail. One of these two actions, Fernandez v. Mackell, 68 Civ. 1176, was originally brought in the Eastern District of New York and was transferred to this court with the consent of the court and of the parties. Since it presents the same issues as Samuels v. Mackell, 68 Civ. 1030, originally commenced in this court and was argued before me at the same time, the two actions are consolidated for all purposes.

It is so ordered.

Dated: New York, N. Y.
April 9, 1968

/s/ FREDERICK v.P. BRYAN
United States District Judge

"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROCKARD, URSULA VIRGINIA WEST and MILTON ELLIS, PLAINTIFFS

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

68 Civ. 1196

FRED FERNANDEZ, PLAINTIFF

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

DECISION OF THREE-JUDGE COURT—June 27, 1968

Heard May 17, 1968 before:

FRIENDLY, *Circuit Judge*, BRYAN and WYATT, *District Judges.*

"APPEARANCES:

Victor Rabinowitz (Rabinowitz, Boudin & Standard, New York, N. Y.), for Plaintiffs George Samuels, Abraham C. Taylor, Herman Benjamin Ferguson, Arthur Harris, Mandola McPherson, Max Standord, Merle Stewart, Hampton Woodward Rockward, Ursula Virginia West and Milton Ellis.

Isidore Beerman, New York, N. Y., for Plaintiff Ursula West.

Eleanor Jackson Piel, New York, N. Y., for Plaintiff Fred Fernandez.

Peter J. O'Connor, Queens, N. Y. (Mortimer Sattler, Ass't. Attorney General of New York State, New York, N. Y., Patrick J. Broderick on brief), for Defendants Thomas J. Mackell and Louis J. Lefkowitz.

FRIENDLY, Circuit Judge:

"Plaintiffs in these consolidated actions [1] are the subjects of a superseding indictment filed by a grand jury in the Supreme Court for Queens County, New York. The indictment contains 43 counts, many of these being against only one or some of the plaintiffs. Forty-one counts charge violations of former New York Penal Law § 1897 [2] relating to the possession of weapons. Another count alleges conspiracy to commit arson in the third degree, Penal Law § 223. What concerns us are counts charging criminal anarchy.

The first count alleges advocacy of criminal anarchy in violation of §§ 160 and 161-1, see fn. 4, in that defendants advocated orally and in writing the overthrow of the governments of the State and its political subdivisions "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished." The second count asserts that, in violation of §§ 160 and 160-2, defendants published and circulated certain printed matter urging the violent overthrow of the State and its political subdivisions and agencies "by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished." The third count charges that, in violation of §§ 160 and 161-4, defendants organized and helped to organize and became members of and voluntarily assembled with each other in

a society formed to teach and advocate the doctrine that the governments of New York and its various political subdivisions and agencies be overthrown by force and violence as described in the first count. The fourth count alleges a conspiracy to commit the crime alleged in the first three, Penal Law § 580. Two other counts charge that Samuels and Stewart permitted premises to be used for the assemblage of persons assembled for the purpose of advocating and teaching that the governments of the State and its various political subdivisions and agencies should be overthrown by force and violence.

The complaints, based in part upon the Civil Rights Act, 42 U.S.C. § 1983, seek an injunction against prosecution under the indictment or, alternatively, a declaratory judgment of invalidity, on the grounds that the New York criminal anarchy statute, Penal Law §§ 160, 161 and 163, violated the First Amendment of the Constitution of the United States, made applicable to New York by the Fourteenth, and entered an area exclusively occupied by the Federal Government, see Pennsylvania v. Nelson, 350 U.S. 497 (1956). They also attack § 596.3 of New York's Judiciary Law requiring that a juror "be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value" as violating requirements of the Federal Constitution that a person may be indicted only by a grand jury representing a fair cross-section of the community,[3] and § 586.6, now § 596.5, of the Judiciary Law in that it furnished no definable standards as to how grand jurors were to be selected. The defendants answered, seeking dismissal of the complaints. Finding that the complaints raised substantial questions under the Constitution, Judge Bryan requested the convocation of a court of three judges, 28 U.S.C. §§ 2281 and 2284. We now have before us motions by the plaintiffs both for a preliminary injunction against continuation of the prosecution and for summary judgment.

The New York criminal anarchy statute is an old one, going back to 1902. Its enactment was a response to the

assassination of President McKinley in Buffalo the preceding year, see People v. Gitlow, 234 N.Y. 132, 156 (1922) (dissenting opinion of Judge Pound). The language was very broad. Section 160 defined criminal anarchy:

> 'Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive hear or of any of the executive officials of government, or by any unlawful means.'

and made "the advocacy of such doctrine either by word of mouth or writing" a felony, without, however, prescribing a penalty. Section 161 [4] spelled out various types of acts within this general concept which constitute felonies punishable by imprisonment for not more than 10 years, fine of not more than $5000, or both. Section 162 forbade assemblages of two or more persons for advocating or teaching criminal anarchy, and § 163 forbade permitting such an assemblage—this being a misdemeanor punishable by imprisonment for not more than 2 years, fine of not more than $2000, or both. Under the new Penal Law, effective September 1, 1967, the various criminal anarchy sections are combined in a single provision reading as follows:

> '§ 240.15 Criminal anarchy
>
> A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.'

Plaintiffs mount a double-barreled attack on the old statute. They say although its constitutionality was sustained in Gitlow v. New York, 268 U.S. 652 (1925), over a dissent by Justices Holmes and Brandeis, later decisions of the Supreme Court, notably Dennis v. United States,

341 U.S. 494, 507-11 (1951), and Yates v. United States, 354 U.S. 298, 318-19 (1957), render it plain that *Gitlow* has been overruled and that a statute making the teaching or advocacy of anarchy a crime can be constitutional only if limited to those words or acts aimed at the violent overthrow of government which, as said in Schenck v. United States, 249 U.S. 47, 52 (1919), create "a clear and present danger that they will bring about the substantive evils" the legislature "has a right to prevent"—as, indeed, the New York Court of Appeals has recently recognized. People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1967), cert. denied and appeal dismissed for want of a substantial federal question, 390 U.S. 29 (1968). They add that the unconstitutionality of §§ 160-162 would not be removed even if—as they dispute—the instant indictment required proof of facts within the *Schenck-Dennis* formulation, since the overbreadth of the statute would have a "chilling effect" on persons desiring to engage in teaching or advocacy in the area between the central core that might be constitutionally forbidden and the broader circumference to which the statute extends. For this they find support in such decisions of the Supreme Court as Dombrowski v. Pfister, 380 U.S. 479 (1965), and Keyishian v. Board of Regents, 385 U.S. 589 (1967), and in decisions of three judge courts invalidating the Mississippi, Kentucky and California Criminal Syndicalism Acts, Ware v. Nichols, 268 F. Supp. 564 (D. Miss. 1967); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967); Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968). They contend in addition that the language of the former New York statute was broad enough to include teaching or advocating the overthrow of the Federal Government, a field held in Pennsylvania v. Nelson, *supra*, to have been preempted against the states by the Smith Act, 18 U.S.C. § 2385; indeed they point to a passage in one of the two majority opinions of the Court of Appeals in *Gitlow* which construed New York's criminal anarchy statute as extending that far, 234 N.Y. at 138 (opinion of Judge Crane). Against the point that the superseding indictment charged only attempting to overthrow state and local governments, they again argue overbreadth.

The State responds that, however all this might have been if the case had come to us some years back, plaintiffs' arguments are drained of their force by the decision in People v. Gitlow, *supra*, that court, with Judge Burke dissenting, reinterpreted the criminal anarchy statute "in accordance with sound constitutional principles so as to preserve its constitutionality." 19 N.Y. 2d at 505, 281 N.Y.S. 2d at 16. It held that the statute must be read as requiring not merely advocacy or teaching of violent overthrow of the government by force and violence but an intent to accomplish the overthrow and a "clear and present danger" that the advocated overthrow may be attempted or accomplished, 19 N.Y. 2d at 506, 281 N.Y.S. 2d at 17.[5] It held also, as we read the opinion, 19 N.Y. 2d at 17-18, that, as the new Penal Code makes plain, the old statute also must be confined to attempted overthrow of the government of New York or a local subdivision, thereby saving it from successful attack on preemption grounds, Uphaus v. Wyman, 360 U.S. 72, 76-77 (1959); DeGregory v. Att'y. General of New Hampshire, 383 U.S. 825, 829-30 (1966).

Far from welcoming this restriction of the area of permissible prosecution under the criminal anarchy statute, the plaintiffs protest it. They contend that the Court of Appeals had no power in 1967 to give the statute a narrower reading that the same court had found in 1922 to be the intent of the legislature of 1902. We do not understand why; it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted all it could have. Time and again the Supreme Court has narrowed the language of Congressional acts to save their constitutionality, see, e.g., Schneiderman v. United States, 320 U.S. 118 (1943), Bridges v. Wixon, 326 U.S. 135 (1945), and, most notably in the present context, in the case of the Smith Act whose language is nearly identical with the New York statute, see Dennis v. United States, *supra*, 341 U.S. at 502-11. We are unable to discern why an earlier broader reading should bar that course. In any event if the Court of Appeals transcended the powers vested in it by the people of New York by narrowing its

previous construction of the criminal anarchy statute, which we in no way intimate, this would be entirely a matter of state law and not one of federal concern.

Plaintiffs argue further, relying particularly on Dombrowski v. Pfister, *supra*, that, even if *Epton* would be a sufficient answer as to future criminal activity, the New York statute had not been thus narrowed to constitutionally permissible limits when most of the acts charged in the indictment were committed. The state counters that *Dombrowski* dealt with a situation where the statute could be brought within acceptable limits only "through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard," 380 U.S. at 491. The Court, it says, there made clear it was speaking only of a case where "the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution," whereas here the Court of Appeals' adoption of the Supreme Court's reading of similar statutory language in *Dennis* was precisely such a construction and the acts are "the sort of 'hard-core' conduct that would obviously be prohibited under any construction." 380 U.S. at 491-92. The State caps its argument by citing a footnote in *Dombrowski* where the Court added, 380 U.S. at 491 n.7:

> Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct prior to the construction, see Poulos v. New Hampshire, 345 U.S. 395; Cox v. New Hampshire, 312 U.S. 569; Winters v. New York, 333 U.S. 507, provided such application affords fair warning to the defendants, see Lanzetta v. New Jersey, 306 U.S. 451; cf. Harrison v. NAACP, 360 U.S. 167, 179.

Plaintiffs contend that as to them the proviso as to "fair warning" was not met. In one sense it clearly was. Since the statute embraced more than it permissibly could embrace, it surely embraced the "hard-core" activities

with which they are charged. Cf. Winters v. New York, 333 U.S. 507 (1946). Although an unduly broad statute is objectionable on other grounds, lack of fair warning is not one; the case differs essentially from the unduly vague statute like that in Lanzetta v. New Jersey [belonging to a "gang"], which the Court's footnote cited as an example. Plaintiffs' point is a rather different one. Until *Epton*, they say, they had every reason to believe the New York criminal anarchy statute as construed by the Court of Appeals in *Gitlow* was unconstitutional. The *Dennis* opinion indicated this, no attempt at enforcement or amendment had been made thereafter, and they could not reasonably have anticipated that the Court of Appeals by overruling its earlier decision would restore life to an act that was moribund. Although under *Dombrowski* persons engaging in "hard-core" activities take their chances on "an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution," it is unreasonable, they say, to apply this rule when the statute has once been broadly construed by the highest court of the state even though—or perhaps particularly because—that construction would render the statute void under current constitutional doctrine.

The argument strikes us as somewhat artificial. The case is not like James v. United States, 366 U.S. 213, 221-22, 241, 242-47 (1961), where defendants were charged with wilfully failing to report income resulting from embezzlement which an earlier decision, never expressly overruled, had held they were not required to report. No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity. The alleged non-enforcement of the New York criminal anarchy statute did not have the effect that might reasonable have been attributed to Connecticut's "undeviating policy" of non-enforcement of its anti-contraceptive statute in the face of flagrant violation, which could well have led citizens to believe they could flout the statute without risk of prosecution. See Poe v. Ullman, 367 U.S. 497, 502 (1961). Neither the complaints nor the moving affidavits allege that plaintiffs entertained the beliefs their lawyers now ingeniously im-

pute to them and, for reasons indicated, we do not understand why the *Epton* decision was not expectable. In any event this point, which would require an examination of defendants' state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record, see Eccles v. People's Bank, 333 U.S. 426, 434 (1948) (Frankfurter, J.); Wright, Federal Courts 391-92 (1963), cf. Bickel, The Least Dangerous Branch, ch. 4 (1962); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947), and would afford no basis for declaratory or, *a fortiori*, injunctive[7] relief.

Even if we should be wrong on this last point or as to plaintiffs' other arguments that *Epton* could not validate application of the old statute to them, see footnote 5, we would still consider the grant of such relief inappropriate under the special circumstances here presented. In saying this we are fully aware of the directives recently given by the Supreme Court, not only in Dombrowski v. Pfister, *supra*, but also in such cases as McNeese v. Board of Education, 373 U.S. 668 (1963), and Zwickler v. Koota, 389 U.S. 241 (1967), see also Cameron v. Johnson, 390 U.S. 611 (1968). However, the common thread running through all these cases—the need of federal declaratory or injunctive relief to protect plaintiffs' constitutional rights with respect to future conduct or events—is wholly absent here. The presently effective New York criminal anarchy statute, Penal Law § 240.15,[8] read in light of *Epton*, does not constitutionally restrict the First Amendment rights of these plaintiffs or of anyone else. We do not think that the Court in *Zwickler* had any intention to overrule the basic principles governing the propriety of declaratory or injunctive relief and to require a federal court to render a declaratory judgment whenever a present or prospective defendant shows that application of a state criminal statute to him would violate a constitutional right, even though there is no possibility that presenting the defense in a pending prosecution and seeking review in the Supreme Court if it is there rejected would "effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 252. Such a view would run directly counter to

the discussion in *Dombrowski*, 380 U.S. at 483-85. See also Pub. Serv. Comm'n. of Utah v. Wycoff Co., 344 U.S. 237, 243-44 (1952); Borchard, Declaratory Judgments 1022 (2d ed. 1941). *Zwickler* was a classic case for declaratory relief; the plaintiff needed to know promptly whether he could distribute anonymous handbills free of New York's threat of punishment. But, with New York law changed as it has been, the instant plaintiffs will not suffer any impairment of First Amendment rights to denounce the government of the state or its subdivisions if they must wait for a federal answer as regards conduct long since past until the state has determined what acts, alleged to be punishable under the statute and the Constitution, they have in fact committed. While their prospect of success in the New York courts may not be bright in view of *Epton*, in this instance Supreme Court review affords wholly adequate relief. See also Zwickler v. Boll, 36 L.W. 3440-41 (May 20, 1968).

We are not persuaded to a different view by plaintiffs' apprenhension that if they should be found guilty on other counts of the indictment, New York might seek to frustrate an appeal to the Supreme Court, as they contend it did in *Epton*, by making their sentences on the criminal anarchy counts concurrent with those on other counts. Not only is this entirely speculative but even if New York should do what plaintiffs fear and the Supreme Court should dismiss their appeal as it did in *Epton*, the Court would do that only because it felt there was no cause for federal concern. New York would have punished the plaintiffs for crimes—illegally possessing weapons and conspiring to commit arson—within its power, and, in light of the new statute and *Epton*, its doing so would have no "chilling effect" on persons desiring now or in the future to teach or advocate the overthrow of government within constitutional bounds. Plaintiffs' fear that New York will use an overbroad criminal anarchy statute in bad faith as a weapon for restraining constitutionally protected speech, while avoiding Supreme Court review, ignores that New York cannot do this so long as *Epton* stands. In contrast to Keyishian v. Board of Regents,

supra, we do have the benefit of a "judicial gloss," 385 U.S. at 601—and of a greatly simplified statute as well.

There remain the plaintiffs' two challenges, going to the entire indictment, which concern New York's method of selecting grand jurors. We have little doubt that, despite the decision of this court in United States v. Foster, 83 F. Supp. 197 (S.D.N.Y. 1949), cf. Fay v. New York, 332 U.S. 259, 291-94 (1947), application of even a modest property qualification for grand jurors might now be held unconstitutional, cf. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Labat v. Bennet, 365 F. 2d 689, 723 (5 Cir. 1966), cf. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), and New York has acted wisely in abolishing it, see fn. 3. However, the defendants have submitted an affidavit by the County Clerk of Queens County that the property requirement had no significance in his selection of jurors since he has long proceeded on the theory, whether factually correct or not, that everyone possessed the minimal amount of property specified. We find far less force in plaintiffs' attack on former subdivision 6, now 5, of § 596 of the Judiciary Law providing that to serve as a grand juror, a person must ". . . be intelligent; of sound mind and good character; well informed . . .," in the absence of evidence of abuse, see Swain v. Alabama, 380 U.S. 202, 205-06, 209 (1965); Chestnut v. New York, 370 F. 2d 1, 7 at n. 13 (2 Cir. 1966), cert. denied, 386 U.S. 1009 (1967), Rabinowitz v. United States, 366 F. 2d 34 (5 Cir. 1966), on which plaintiffs rely, did not hold such standards to be unconstitutional; the decision went rather on the ground that the clerk and the jury commissioner had superimposed additional standards of their own, designed in part to diminish the number of negro jurors, on the uniform standards enacted by Congress in 1957, 28 U.S.C. § 1861. However all this may be, we see no reason why plaintiffs' contentions as to grand jury selection cannot be effectively presented in the New York courts and to the Supreme Court on review. Douglas v. City of Jeannette, 317 U.S. 157 (1943); Stefanelli v. Minard, 342 U.S. 117 (1951). Indeed, these questions, going to the validity of this and many other indictments, seem peculiarly a matter to be

determined by the state courts in the first instance. Chestnut v. New York, *supra*, 370 F. 2d at 6-8, U.S. ex rel. Epton v. Nenna, 281 F. Supp. 388, 390 (S.D.N.Y. 1968).

Since the complaints present no case for federal relief, the Clerk is directed to enter a judgment of dismissal, as prayed by the State.

.....
U.S.D.J.

.....
U.S.D.J.

.....
U.S.D.J.

June 1968.

Footnotes

1. The Fernandez action was brought in the Eastern District of New York and transferred here by consent.

2. All references are to the former Penal Law, repealed September 1, 1967, unless otherwise stated.

3. Since subdivision 3 was repealed, effective September 1, 1967, plaintiffs' attack is necessarily limited to the State grand jury. Although the superseding indictment was filed thereafter, counsel advised us that this was returned by the same grand jury that had rendered the original indictment.

4. § 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any

book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrine of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

5. We reject plaintiffs' claims that, even after *Epton*, the statutes under which they have been indicted are still unconstitutionally vague in scope. Four of their arguments merit discussion. First, while *Epton* does not expressly state that only when the speaker uses language that *incites to action* may he be prosecuted under §§ 160 and 161, see Yates v. United States, *id.* at 320-25, in the *Gitlow* case itself, both the Court of Appeals, 234 N.Y. at 149, and the Supreme Court, 268 U.S. at 664-65, so construed the statute. Though the indictment in the present case does not expressly charge incitement—indeed its charge that the defendants advocated the "duty" and "necessity" of overthrow was expressly held inadequate in *Yates*, *id.* at 324—it is the indictment, not the statute, that is overly broad in this respect. Second, while the Court of Appeals did not expressly deal with those clauses in §§ 160 and 161 that prohibit the advocacy of overthrow "by any unlawful means" other than force and violence, the fair implication is that these provisions have been read out of the statute. Third, we think it apparent that the same principle of construction applied in *Epton* would limit the

relevant portion of § 161-4 to becoming a member with knowledge that the society advocates the overthrow of government by force and violence and intends that this be accomplished. Contrast United States v. Robel, 389 U.S. 258 (1967). Finally, while the *Epton* court had no occasion to construe old § 163 which forbade any owner, agent or occupant "willingly and knowingly" to permit two or more anarchists the use of premises under his control it follows under the principles of the *Epton* decision that to violate § 163 one must know of the present danger of violence.

6. While Epton necessarily decided this issue adversely to the plaintiffs' argument, we cannot be certain whether the Supreme Court in dismissing the appeal, 390 U.S. 29, passed on that point or rested decision on the concurrent sentences on other counts.

7. The question whether the provision in the Civil Rights Act, now 42 U.S.C. § 1983, authorizing a "suit in equity," brings that statute within the exception of the anti-injunction statute, 28 U.S.C. § 2283, "except as expressly authorized by Act of Congress," is one of great consequence on which inferior federal judges have sharply differed and the Supreme Court has not found occasion to rule. See Dombrowski v. Pfister, *supra*, 380 U.S. at 484 n. 2; Cameron v. Johnson, 381 U.S. 741 (1965) and 390 U.S. 611 n. 3 (majority opinion) and n. 5 (dissenting opinion) (1968). Cf. City of Greenwood v. Peacock, 383 U.S. 808, 829, 852-53 (1966). The American Law Institute has proposed a much more limited exception. Study of the Division of Jurisdiction between State and Federal Courts, § 1372(7), Tent. Draft No. 6 (1968).

8. The new statute, among other things, eliminates the "any unlawful means" language of § 161-1 and 2, and the assemblage clause, § 163, and makes clear that membership is punishable only if accompanied by knowledge of the organization's purpose to advocate violent overthrow —in the *Epton* sense.

SUPREME COURT OF THE UNITED STATES

No. 844 Misc., October Term, 1968

FRED FERNANDEZ, APPELLANT

v.

THOMAS J. MACKELL, District Attorney, ET AL.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

December 9, 1968

SUPREME COURT OF THE UNITED STATES

Nos. 580 and 844 Misc., October Term, 1968

GEORGE SAMUELS, ET AL., APPELLANTS

v.

THOMAS J. MACKELL, District Attorney, ET AL.; and
FRED FERNANDEZ, APPELLANT

v.

THOMAS J. MACKELL, District Attorney, ET AL.

APPEALS from the United States District Court for the Southern District of New York.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and one hour is allotted for oral argument and No. 844 Misc. is transferred to the appellate docket as No. 813.

December 9, 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 331036 432

No. 9

Issues. Statement not printed
(filed Sept 12, 1968)
Vide No. 7, for Motion to
dismiss or affirm
(filed Oct 26, 1968)
Reply to motion to dismiss
or affirm not printed)
(filed Nov 13, 1968)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~225~~ ~~20~~ 9

FREL FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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INDEX

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Preliminary Statement	4
Statement of Facts	6
The Friendly Opinion: Anarchy Statutes	11
The Friendly Opinion: The Grand Jury Statutes	13
The Friendly Opinion: Harassment	14
Summary of Argument	15
Argument	18
I—New York's 1902 Anarchy Statutes Are Unconstitutional in Violation of the First, Fifth and Fourteenth Amendments to the Constitution. Enforcement of These Anarchy Statutes in 1967 Represents Ex Post Facto Judicial Legislation Which Ignores Established Principles of Fair Warning and Stare Decisis As Well As Supersedure of Federal Law As to Acts of Sedition	18
History of the Anarchy Statutes	18
Stare Decisis Ignored	22
Vague and Overbroad	24
Dennis Distinguished	27

Page

Supersedure 29

Judicial *Ex Post Facto* Legislation *In Futuro* 32

No Fair Warning 33

II—The Provisions of the New York State Judiciary Law Establish Subjective Criteria for the Selection of Grand Jurors Along With Discriminatory Economic Criteria of Ownership of Property and Are Violative of the Equal Protection Clause of the Fifth Amendment As a Matter of Law 35

III—Plaintiff's Challenge in the Federal Court of Unconstitutional State Anarchy Statutes and State Legislative Procedures for Selecting Grand Jurors Entitled Him to Declaratory Relief and/or An Injunction If Necessary 40

Conclusion 44

Erratum 45

Appendix A—Statutes Involved 47

Appendix B—Original Indictment 54

Appendix C—Excerpts From Publications 65

CITATIONS

CASES:

Albertson v. *Millard*, 345 Mich. 519, 77 N.W. 2d 104 (1956) 30

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 26, 39

Baker v. *Binder*, 274 F.Supp. 658 (W.D. Ky., 1967) 27

Bouie v. *City of Columbia*, 378 U.S. 347 (1963) .. 16, 26, 33, 34

Braden v. *Commonwealth*, 291 S.W. 843 (Ky., 1953) 30

Page

Cameron v. *Johnson*, 390 U.S. 611 (1968) 42, 43
Carmichael v. *Allen*, 267 F.Supp. 985 (N.D. Ga., 1967) 28
Chestnut v. *New York*, 370 F.2d 1 (C.A. 2, 1966) cert. den. 386 U. S. 1009 ..... 36, 39
City of Greenwood v. *Peacock*, 384 U.S. 808 (1966) 43
Commonwealth v. *Dolson*, 183 Pa. Super. 339, 132 A.2d 692 (1957) 30
Commonwealth v. *Gilbert*, 334 Mass. 71, 134 N.E. 2d 13 (Sup. Jud. Cty., 1956) 30
Commonwealth v. *Hood*, 334 Mass. 76, 134 N.E. 2d 12 (1956) 30
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961) 26
De Jonge v. *Oregon*, 299 U.S. 353 (1937) 26
Dennis v. *United States*, 341 U.S. 494 (1951) .. 25, 27, 28, 33
Dombrowski v. *Pfister*, 227 F.Supp. 556 (E.D. La., 1964) 31
Dombrowski v. *Pfister*, 380 U.S. 479 (1965) ..18, 33, 41, 42, 43
Douglas v. *City of Jeanette*, 319 U.S. 157 (1943) 42
Fay v. *New York*, 332 U.S. 259 (1947) 37
Gitlow v. *New York*, 268 U.S. 652 (1925) 12, 21, 23, 25
Harper v. *Virginia Board of Elections*, 383 U.S. 663 (1966) 17, 37, 40
Harris v. *Younger*, 266 F.Supp. 564 (C.D. Cal., 1968) [Prob. Juris. noted Jan. 13, 1969] 28
Herndon v. *Lowry*, 301 U.S. 242 (1937) 26
James v. *United States*, 336 U.S. 213 (1961) 33, 34
Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 16, 23, 24, 25, 28, 34
Labat v. *Bennett*, 365 F.2d 698 (C.A. 5, 1966) .. 37

Page

Levitt v. *Dillon*, Civ. Action 1P 65-C-462 S.D. Ind. 30
Louisiana v. *United States*, 380 U.S. 145 (1965) 36

McSurely v. *Ratliff*, 282 F.Supp. 848 (E.D. Ky., 1967) 28

N.A.A.C.P. v. *Button*, 371 U.S. 415 (1963) 26
Noto v. *United States*, 367 U.S. 290 (1961) 25

Pennsylvania v. *Nelson*, 350 U.S. 497 (1955) ..16, 30, 31, 32, 34
People v. *Agron*, 10 N.Y. 2d 130 (1961) 39
People v. *Cohen*, 54 Misc. 2d 873, 283 N.Y.S. 2d 817 (Kings Cty., 1967) 39
People v. *Dessaure*, 299 N.Y. 126 (1949) cert. den. 337 U.S. 949 39
People v. *Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829 (1967) cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976 ....2, 11, 12, 13, 14, 15, 16, 17, 18 21, 22, 23, 24, 25, 26, 28, 30, 32
People v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924 (1968) 7
People v. *Finkelstein*, 9 N.Y. 2d 342 (1961) 24
People v. *Gitlow*, 195 A.D. 773, 187 N.Y.S. 783 (1st Dept., 1921) 16, 19
People v. *Gitlow*, 234 N.Y. 132 (1922) 16, 18, 21, 22, 25, 30
People v. *Horton*, 18 N.Y. 2d 355 (1966) 39
People v. *Prior*, 294 N.Y. 405 (1945) 39
People v. *Ruppert*, 53 Misc. 2d 845, 279 N.Y.S. 2d 895 (Westchester Cty., 1967) 39
People v. *Smith*, 54 Misc. 2d 902, 283 N.Y.S. 2d 594 (Genesee Cty., 1967) 39
People v. *Thomas*, 53 Misc. 2d 427 (Onondaga Cty., 1967) 39
Pierce v. *United States*, 314 U.S. 306 (1941) 34
Poe v. *Ullman*, 367 U.S. 497 (1961) 38, 42

Page

Rabinowitz v. *United States*, 366 F.2d 34 (C.A. 5, 1966) 37
Robb v. *Connally*, 111 U.S. 624 (1883) 42

Scales v. *United States*, 367 U.S. 203 (1961) 25
Schenck v. *United States*, 249 U.S. 47 (1919) .. 21, 28
Smith v. *California*, 361 U.S. 147 (1959) 26
State v. *Cade*, 244 La. 534, 153 So.2d 382 (1963) 30
State v. *Jenkins*, 236 La. 300, 107 So.2d 648 (1958) 30
State v. *Levitt*, 203 N.E. 2d 821 (Ind., 1965) 30

Thiel v. *Southern Pacific*, 328 U.S. 217 (1946) 17, 37

United States v. *C.I.O.*, 335 U.S. 106 [Rutledge concurring (1948)] 27
United States ex rel. Epton v. *Nenna*, 281 F. Supp. 388 (S.D.N.Y., 1968) 39
United States v. *Foster*, 83 F.Supp. 197 (S.D. N.Y., 1949) 37
United States v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) 27
Uphaus v. *Wyman*, 360 U.S. 72 (1959) 30, 31

Ware v. *Nichols*, 266 F.Supp. 564 (N.D. Miss., 1967) 28
Watkins v. *United States*, 354 U.S. 178 (1957) 27
Whitus v. *Georgia*, 385 U.S. 545 (1967) 17, 37, 38
Winters v. *New York*, 333 U.S. 507 (1948) 16, 26
Wood v. *Georgia*, 370 U.S. 375 (1962) 36

Yates v. *United States*, 354 U.S. 298 (1956) 25, 27

Zwickler v. *Koota*, 389 U.S. 241 (1967) 18, 39, 42, 43

STATUTES:

United States Constitution
First Amendment 10, 14, 15, 16, 17, 18, 22, 26, 34, 40, 41, 42
Fifth Amendment 10, 16, 17, 18, 34
Fourteenth Amendment 10, 16, 17, 18

Page

United States Code
18 U.S.C. §2385 [*The Smith Act*] 2, 10, 16, 27, 28, 30, 31
28 U.S.C. §1253, 62 Stat. 928 2
28 U.S.C. §2281 5
50 U.S.C. §481 [*The Communist Control Act of 1954*] 30, 31
50 U.S.C. §781 [*The Internal Security Act of 1950*] 31

McKinney's Constitution Laws of New York
Book 1, Statutes §72 24

New York Education Law
Section 3021 25

New York Judiciary Law (former)
Section 596 ..... 2, 4, 6, 7, 10, 13, 17, 34, 35, 48
Section 661 ..... 2, 4, 6, 7, 10, 13, 17, 34, 52

New York Judiciary Law
Section 609 ..... 2, 4, 7, 10, 13, 17, 36, 49

New York Penal Law (former)
Section 160 ..... 2, 3, 4, 10, 15, 16, 18, 19, 24, 29, 30, 31, 32, 41, 47
Section 161 ..... 2, 3, 4, 10, 15, 16, 18, 19, 22, 23, 24, 29, 30, 31, 32, 41, 47
Section 162 ..... 18, 19, 22, 23
Section 163 ..... 18, 19, 22, 23
Section 164 ..... 18, 19, 22, 23
Section 165 ..... 18, 19, 22, 23
Section 166 ..... 19, 22, 23
Section 223 7

New York Penal Law
Section 240.15 ..... 3, 14, 32

Page

Proposed Legislation
HR 305, 86th Cong., 1st Sess. 32

MISCELLANEOUS:

8 A.L.R. 3rd 301 43

Black Power Advocacy: Criminal Anarchy or Free Speech, 56 Cal. L. Rev. 702 (May, 1968) .. 28, 40

Federal Injunction and State Enforcement of Invalid Criminal Statutes, 65 Col. L.R. 647 (1965) 43

Free Speech in Its Relation to Self Government; Meiklejohn, Alexander; Harper and Row, 1948 21

Survey of Consumer Expenditures 1960-1961, Supplement 2, *Bureau of Labor Statistics Report,* No. 237-93, June 1966: "Consumer Expenditures and Income, Cross Classification of Family Characteristics," Table 22b, p. 69 38

The Supreme Court and Civil Liberties, Freund, Paul; 4 Vanderbilt L. Rev. 533 29

The Void for Vagueness Doctrine, 109 Pa. L.R. 67 (1960) 27

United States Census of Population 1960, United States Summary, General Social and Economic Characteristics, PC (1) 1C, Table 76, p. 1-207 39

Variation on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights, Wisconsin L.R., 1968, p. 369 ..... 28, 41

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 813

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

Opinion Below

The opinion of the District Court dismissing appellant's complaint is reported at 288 F. Supp. 348.

Jurisdiction

The judgment of the United States District Court for the Southern District of New York which dismissed appellant's complaint and which upheld the constitutionality of

New York Penal Law §§160 and 161 and New York Judiciary Law §§506, 609 and 661, was entered on June 26, 1968. Notice of Appeal was filed July 15, 1968 [A 4].[1] This Court noted probable jurisdiction on December 9, 1968, when it consolidated the appeal of the within case with *Samuels* v. *Mackell*, No. 580, and granted appellant herein leave to proceed in *forma pauperis* [A 72].

This appeal is prosecuted pursuant to 62 Stat. 928, 28 U.S.C. 1253.

Questions Presented

1.) Whether appellant, under indictment under New York's 1902 criminal anarchy statutes, is entitled to a declaratory judgment that the "Gitlow" statutes are unconstitutional 1.) for overbreadth and vagueness and, 2.) by reason of supersedure by federal law [the *Smith Act*]. The three-judge federal court denied the relief on the authority of *People* v. *Epton*.[2]

2.) Whether appellant, a defendant in a state court criminal proceeding charged with acts committed before New York's *Epton* decision, had a right to rely on the law and line of decisions previously enunciated by this Court as holding the 1902 statutes unconstitutional. The three-judge federal court held *Epton* was "expectable" and the *ex post*

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[1] References to the separate appendix are to "A" followed by the page number. Attached to this brief are three appendices—A, B and C being statutes involved, the original indictment and selections from the order to show cause (A 2) respectively. References to these are to "Appendix A," "B" or "C."

[2] *People* v. *Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829 (May 17, 1967) cert. den. appeal dismissed 390 U.S. 29 rehearing den. 390 U.S. 976.

facto application of this interpretation was not barred by the Constitution or otherwise.

3.) Whether New York's Judiciary Laws, which set a minimum property requirement and empowered the County Clerk to invoke subjective selection standards and under which the Grand Jury in this case was impanelled, are not unconstitutional as discriminatory on their face. The three-judge federal court held that, although the statutes appeared to be unconstitutional as to the minimum property requirement, nonetheless, the assertion by the County Clerk that the statutes were not followed supported dismissal of the complaint.

4.) Whether, under the facts alleged, appellant is entitled to declaratory relief and/or an injunction against the enforcement of unconstitutional state statutes and whether in this connection there should have been a hearing as to the facts on this issue. The three-judge federal court denied declaratory relief, an injunction and a hearing and dismissed the complaint on the ground that the possibility of ultimate Supreme Court review, after trial in the state court, was an adequate remedy.

Statutes Involved

The New York State statutes challenged in this proceeding are former Penal Law §§160 and 161[3] and former Judi-

[3] Amended effective September 1, 1967. New Penal Law section 240.15, which replaces the old anarchy sections 160-166, reads: "A person is guilty of criminal anarchy when a) he advocates the overthrow of the existing form of government of this state by violence, or b) with knowledge of its contents he publishes, sells or distributes any document which advocates such violent overthrow, or c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.

ciary Law §§596 and 661[4] and Judiciary Law §609,[5] and are set forth in Appendix A hereto.

Preliminary Statement

This is an action for an injunction and declaratory relief against the effect of the provisions of New York's anarchy laws—the so-called "Gitlow" statutes[6]—and against the effect of the Judiciary laws providing for the selection of a Grand Jury in New York City which requires, or did at the time of the indictment, that every prospective grand juror be the owner of $250.00 worth of property and grants the County Clerk power to discriminate as to selection without setting objective standards.[7] Plaintiff-appellant is one of seventeen originally indicted in June of 1967 for the crimes of advocacy of anarchy and conspiracy to advocate the crime of anarchy against "the government." Upon motion of the defendants, the original indictment was dismissed,[8] and a new superseding indictment was filed in September, 1967, alleging, *inter alia*, that defendants advocated and conspired to advocate the crime of anarchy against the State of New York [A 17-23].

Plaintiff filed his complaint in the federal district court where he asserted that he is a black, Afro-American citi-

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[4] Amended effective September 1, 1967, to eliminate the challenged $250.00 property requirement.

[5] New Judiciary Law §609 effective September 1, 1967, requires the County Clerk to make a "special investigation of persons qualified to serve as grand jurors."

[6] New York Penal Law §§160, 161.

[7] New York Judiciary Law §§596, 609, 661.

[8] A copy of the original indictment is attached herewith as Appendix B.

zen who has joined with others in various peaceful protest activities involving the exercise of his rights of free speech, press and assembly; that the District Attorney of the County of Queens, New York, in order to harass the appellant herein and defendant below under color of the unconstitutional anarchy statutes caused his indictment by a Grand Jury which was illegally constituted pursuant to a statute which demanded a minimum property ownership and gave authority without setting objective standards to the County Clerk in the selection of such jury [A 11-13]. The indictment and arrest was accompanied by voluminous and prejudicial publicity all initiated by the defendant-District-Attorney Mackell in the interests of harassment of the indictees including Fernandez and which deprived them of their rights as citizens of the United States [Appendix C].

Fred Fernandez, the appellant herein, filed his complaint in the Eastern District of New York. George Samuels and nine other co-defendants of Fernandez filed a similar complaint for injunctive and declaratory relief in the Southern District of the United States District Court in New York. With the consent of counsel, both actions were consolidated and heard in the Southern District of New York [A 57]. Judge Frederick vanPelt Bryan ordered the convening of a three-judge statutory court under 28 U.S.C. §2281 [A 54]. Thereafter, plaintiffs in the Samuels case brought on a motion for summary judgment in which plaintiff Fernandez joined [A 3]. Papers supporting the charge that defendant Mackell had given out numerous and prejudicial press releases concerning the guilt of the defendants had been filed by plaintiffs in the case [A 2]. (See Appendix C.) Defendants filed an affidavit by Paul

Livoti, County Clerk, denying (on information and belief) that he had, in fact, ever had reason to enforce the $250.00 minimum property requirement of Judiciary Law §§596(3) and 661 [A 41-43].

After argument before the three-judge court, that court filed its opinion denying the relief sought by plaintiffs and dismissing the complaints [A 69].

Statement of Facts

The original indictment against the defendant Fred Fernandez and sixteen co-defendants contained seventeen counts.[9] Fernandez was named in the first, fourth and fifth counts and charged with the following crimes:

> 1.) Count I: acting in concert advocated orally and in writing the propriety of overthrowing the organized government by assassination of the executive officers and by force and violence and printed and published documents advocating same;
>
> 2.) Count IV: unlawfully conspiring with persons known and unknown to commit the crime of advocacy of criminal anarchy. Nine overt acts covering a period from December 9, 1965, through May 30, 1967, are enumerated. They include forming a rifle club, obtaining rifles and guns, attending classes in Aikido and Mayhem, storing printing equipment, printing a newsletter, issuing literature concerned with "deadly force" against the police, issuing literature advocating the overthrow of organized government called "The Strug-

[9] The full text of that indictment appears in Appendix B attached.

gle for Black State Power in the U.S.," obtaining and possessing pipes and gunpowder for explosives;

3.) Count V:[10] conspiring with the fifteen other defendants to commit the crime of arson in the Third Degree[11] alleging four overt acts between April 26, 1967, through May 5, 1967, involving the "observing" of a lumber yard, a tire company, storing cans of gasoline and oil and storing pipes and gunpowder.

The other fifteen counts of the indictment concerned the co-defendants and charged illegal weapons possession, as a misdemeanor and felony, and permitting premises to be used for assemblages of anarchists (P.L. §163).

Demurrers to the indictment by the defendant Fernandez and a number of other defendants were sustained by the Queens County Supreme Court[12]—particularly as to the first and fourth counts and on September 17, 1967, the same Grand Jury which had indicted the defendant in June, 1967, returned a superseding indictment against the defendant Fernandez and fourteen other of the original defendants containing forty-eight counts [A 16-34].

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[10] Except as the whole indictment is challenged by the attack on the Grand Jury impanelling statutes (Jud. Law §§596, 609 and 661) this count is not specifically at issue as arson is a Penal Law Code offense based on common law.

[11] Old Penal Law §223 provides: "A person who wilfully burns, or sets on fire a vessel, car, or other vehicle, or a building, structure, or other erection, or who wilfully and maliciously burns or sets on fire any personal property of another person, such personal property being of a value of twenty-five dollars or over, under circumstances not amounting to arson in the first or second degree, is guilty of arson in the third degree."

[12] *People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924 (1968).

The new and superseding indictment differs from the initial indictment as to the defendant Fernandez in that "organized government" is replaced by "governments of the State and its political subdivisions." Defendant Fernandez and his co-defendants are charged with three counts of anarchy (Counts I-III).

1.) Count I charges Fernandez and his co-defendants with advocating the overthrow of the state government by the use of rifles, shotguns, firearms, bombs and ignited gasoline against publically owned and operated transportation facilities, etc., with the intent that these acts be presently attempted and accomplished [A 17].

2.) Count II charges the defendant Fernandez and his co-defendants with circulating documents which advocated and taught the doctrine that the organized governments of the State and its subdivisions "should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers . . . and members of the State guard . . . with the further intent that said acts be presently attempted and accomplished" [A 17-18].

3.) Count III recites that the defendant Fernandez acting in concert, became a member of and organized a group formed to teach and advocate the doctrine that organized government be overthrown as alleged in Count I [A 18].

4.) Count IV recites a conspiracy among all the defendants to commit the crimes described in the first three counts and charges nineteen overt acts in sup-

port thereof taking place between October 5, 1965, and April 23, 1967 [A 19-22].

5.) A Count V similar to the original Count V charged the defendant Fernandez and his co-defendants with conspiracy to commit arson in the third degree. The other forty-three counts did not involve Fernandez and were similar to, but more detailed than the fifteen weapons counts and permitting-premises-to-be-used-for-assemblages-of-anarchists counts of the original indictment [A 23-24].

Simultaneous with the filing of the original indictment and in June, 1967, an additional indictment was filed against two of the co-defendants of Fernandez, Ferguson and Harris, charging them with conspiracy to murder Roy Wilkins and Whitney Young. Thereafter, and from June 22, 1967, on, all the defendants including Fernandez were lumped together as conspirators in the homicide case. Defendant Mackell gave numerous press interviews linking the defendants as plotters to assassinate Wilkins and Young [B-1, B-3][13] and followers of Chinese Premier Mao Tse-Tsung [B-3, B-23]. (See Appendix C.)

The press releases and interviews of defendant Mackell referred specifically to an alleged prior criminal record of the defendant Fernandez—violating the weapons laws (not charged in the indictment) [B-18], inciting a riot (a charge of which he was never formally accused) of influencing youths between the ages sixteen and twenty-one with the R.A.M. (Revolutionary Action Movement) philosophy [B-19] which was a "revolution that would seize power in

[13] The "B" references are to the pages in the original record attached to order to show cause filed March 15, 1968 [A 2].

the United States and throughout the world by violence and assassination" [B-19]. The movement was linked by Mackell to recent race riots in other U.S. cities [B-26]. (See Appendix C.)

After the defendant Fernandez was reindicted in September, 1967, and in March, 1968, he brought the instant action by filing a complaint in the federal district court requesting declaratory relief and an injunction against the State prosecution based on the unconstitutionality of Penal Law §§160 and 161 and Judiciary Code §§596, 609 and 661 [A 11]. As to the anarchy statutes, appellant alleged that they were void on their face in violation of the First, Fifth and Fourteenth Amendments in that they were vague and indefinite and, further, that they had been superseded by 18 U.S.C. §2385 [the *Smith Act*]. As to the Grand Jury statutes, appellant asserted that the standards the law set up for the selection of the Grand Jurors which indicted him were discriminatory in that there was a $250.00 property requirement and, further, that additional subjective standards were set which vested the County Clerk with arbitrary power in the selection of Grand Jurors.

The forty-three unrelated-to-the-appellant counts of the indictment, plaintiff below asserted, have further relevance to the instant complaint because they allege that the District Attorney of Queens, the defendant-appellee in this case, has instituted a course of action designed to subject the appellant to a deprivation of rights secured him under the Constitution. In support of this allegation, appellant asserts in his complaint and later relies on documentary support [A 13], (Appendix C) that the District Attorney had issued press releases and other public statements and

has falsely connected the appellant with charges of conspiracy to murder lodged against associated co-defendants of the appellant in the instant case. These allegations supported the request for an injunction against the State prosecution.

The defendants and respondents answered the appellant's complaint and counsel for plaintiffs associated with appellant in the companion case (*Samuels* v. *Mackell*) moved for summary judgment in which appellant joined [A 10].

In opposition to the motion for summary judgment, defendants filed an affidavit by Paul Livoti, the County Clerk of Queens County, alleging that he had held office since 1958 and, that on information and belief, the $250.00 property requirement had never been enforced to exclude any person otherwise qualified [A 42].

Thereafter, respondent moved to dismiss and after argument and on June 27, 1968, the complaint was dismissed with an opinion by Judge Henry J. Friendly for the three-judge court.

The Friendly Opinion: Anarchy Statutes

In dismissing plaintiff's complaint as to the anarchy counts, the court below has accepted and endorsed the reasoning of New York's Court of Appeals in *People* v. *Epton*, *supra*. In so doing, the court below has embraced the self-contradictory ruling by the highest court of a state holding that such state court may, as it did in 1922, approve in a literal interpretation of the statutory language a criminal statute passed in 1902 and that the same state court may, as it did forty-five years later, invalidate its 1922 interpretation and again approve this criminal statute under an

entirely new gloss intended to bring its holding into line with the rulings of this Court in the forty-five year period during which the statute was moribund—and then apply this new gloss on the criminal statute retrospectively. The court below says the defendants (plaintiffs and appellants herein) should have known their "hard core" conduct was illegal and would "be prohibited under any construction [of the statute]"—that *Epton* was "expectable"

> "it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted all it could have" [A 63].

The court handled plaintiffs' protest that there was no fair warning with

> "In one sense it [fair warning] clearly was. Since the statute embraced more than it permissibly could embrace, it surely embraced the 'hard-core' activities with which they are charged . . . although an unduly broad statute is objectionable on other grounds, lack of fair warning is not one" [A 64-65].

The court termed "as somewhat artificial" plaintiff's protest that he could not anticipate the *Epton* treatment of *Gitlow*.[14]

> "No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity" [A 65].

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[14] *Gitlow* v. *New York*, 268 U.S. 652 (1925).

Said the court:

> "In any event this point, which would require an examination of defendant's state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record . . . and would afford us no basis for declaratory or *a fortiori* injunctive relief" [A 66].

and again:

> "While their [the plaintiffs'] prospect of success in the New York courts may not be bright in view of *Epton*, in this instance Supreme Court review affords wholly adequate relief" [A 66].

The Friendly Opinion: the Grand Jury Statutes

Plaintiff Fernandez had challenged former Judiciary Law §596 providing for the selection of Grand Jurors (containing the $250.00 property requirement, amended effective September 1, 1967, and a requirement that a grand juror applicant be "intelligent" and of "good character") and new §609 granting, as of September 1, 1967, authority to the County Clerk to make a special investigation and a list of those persons who, this investigation shows, are suitable to serve as Grand Jurors and former Judiciary Code §661, a form of questionnaire testing the $250.00 property qualification (from which section the $250.00 property qualification was omitted effective September 1, 1967) [A 14].

The plaintiff had originally been indicted in June, 1967, under the old Judiciary laws with the $250.00 property minimum requirement a part of the law. After a demurrer

was sustained to the original indictment, a superseding indictment was lodged by the same Grand Jury in September, 1967, after the effective date of the new laws which, while retaining the discretion of the County Clerk, eliminated the $250.00 property requirement.

The court below stated that even a modest property qualification for Grand Jurors might now be held unconstitutional. However, since the defendants-respondents submitted an affidavit of the Queens County Clerk that "the property requirement had no significance in his selection of jurors," there was "less force in plaintiff's attack" on the language of the statutes *per se* [A 68]. The court below apparently accepted defendant's affidavit as dispositive of the constitutional issue and held the issue, if any, was one to be determined by the state courts in the first instance.

The Friendly Opinion: Harassment

The court below ignored the allegations of plaintiff's verified complaint, that the prosecution is in essence a form of unjustified political and racial harassment, and deemed those allegations insufficient to support a hearing. The court held that plaintiff need have no fear as to future prosecution under the 1902 anarchy statutes since a new penal statute (Penal Law §240.15) "read in the light of *Epton* does not unconstitutionally restrict the First Amendment rights of these plaintiffs or of anyone else [A 66]."

Plaintiff's argument that a concurrent sentence imposed on the anarchy counts in conjunction with the other crimes charged could frustrate an appeal to this Court is dismissed as speculative and impossible.

"New York cannot do this so long as *Epton* stands" [15] [A 67].

Summary of Argument

Plaintiff below, Fred Fernandez, sued to obtain declaratory and/or injunctive relief against a state criminal prosecution after indictment but before trial on the grounds that the statutes defining four of the forty-eight counts of the indictment (as to anarchy) are unconstitutional as are the statutes providing for the selection of the Grand Jury

[15] If "hard core" as used by the court below means other statutorily defined criminal acts associated with the anarchy charges, this argument as to *Epton* is peculiarly relevant. Epton was convicted of criminal anarchy and conspiracy to commit criminal anarchy *and* conspiracy to riot. Although the anarchy was a felony, Epton's sentence was one year to be served concurrently—the maximum misdemeanor sentence for a conspiracy. The dissent in the Court of Appeals and this Court in a memorandum opinion concurring in the denial of certiorari by Mr. Justice Stewart gave great weight to the conspiracy to riot conviction on the theory, implied but not explicitly expressed, that conspiracy to riot must be "hard core" conduct. But see Mr. Justice Douglas' dissent, 390 U.S. 29, 30.

Fernandez, the appellant herein, is charged with four counts of anarchy and conspiracy to commit anarchy and one count of conspiracy to commit arson in the third degree. If the prosecution goes forward here, Fernandez could be tried and evidence adduced under the vague and overbroad anarchy statutes reflecting the speech or advocacy of Fernandez and others on divers occasions, which evidence could prejudice a jury as to appellant's guilt on the conspiracy to commit arson charge. Fernandez could be found guilty or acquitted of the anarchy charges. If acquitted, of course, the constitutionality of §§160 and 161 would not reach this Court. A finding of guilt on all charges including the misdemeanor arson charge and a misdemeanor sentence could also forever foreclose this Court from considering the provisions of the anarchy statutes. But the statutes would have had their "chilling effect" both as to this appellant's First Amendment rights and as to others who have ample opportunity to follow the fate of appellant and his associates in the press, on radio, and on television.

which authorized the entire indictment against the plaintiff-appellant.

The anarchy statutes (New York Penal Law §§160, 161), passed in 1902, violate the First, Fifth and Fourteenth Amendments to the Constitution, *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). They were held constitutional by the highest court of the State of New York and by this Court in the 1920's [*People* v. *Gitlow*, 234 N.Y. 132 (1922), aff'd. 268 U.S. 652 (1925)] on the theory that a sedition statute applicable alike to state or national government which proscribes speech only is valid legislation even in the absence of a finding of a clear and present danger that the speech will bring about the evil the legislature sought to suppress. After *Gitlow*, New York did not again invoke these anarchy statutes until 1964 and the prosecution of William Epton, a black citizen charged with anarchy and riot for activities connected with the Harlem Riots of 1964. In *People* v. *Epton*, 19 N.Y. 2d 496 (1967) cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976, the Court of Appeals of the State of New York applied a new gloss to the anarchy statutes reading into them clear and present danger and rejecting the argument from *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1955), that the *Smith Act* and related federal sedition legislation had occupied the field. The *Epton* court further rejected the argument that its new interpretation violated *stare decisis* and failed to give fair warning to a defendant charged with violation of a criminal statute which violated the Constitution further for vagueness and overbreadth. *Winters* v. *New York*, 333 U.S. 507 (1948); *Bouie* v. *City of Columbia*, 378 U.S. 347 (1963).

In the instant case, a three-judge federal court in New York refused to interfere in the second prosecution of Negroes in New York for sedition against the state government in the face of the allegation in their complaints that they were being discriminated against racially and penalized for political protest and speech. The federal court decision relied on *Epton*, applying the new, 1967, interpretation of the law to acts and speech occurring before the New York court had discovered this gloss on the ground that the "hard core" conduct charge was "expectable." In so doing, the court below violated the First Amendment proscription against abridgement of speech and the Fifth and Fourteenth Amendments guarantees of due process of law.

Plaintiff-appellant also challenged New York Judiciary Law §§596, 609 and 661 which require a prospective Grand Juror to be the owner of property of the value of $250.00 and authorize the County Clerk to select Grand Jurors who are "intelligent," of "good character" and "well informed" without setting out any standards for such determination. These provisions are discriminatory and there is a correlation between economic and racial discrimination which, as applied to the indictment in the instant case, violates the equal protection and due process clauses of the Fifth Amendment. *Thiel* v. *Southern Pacific*, 328 U.S. 217 (1946); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

The court below relied on an *ex parte* affidavit of the County Clerk that he had not enforced the property requirement and dismissed the challenge to the lack of objective standards on the grounds that the better policy would be to await state determination of this issue.

Appellant maintains that the statutes are invalid on their face and that the court had an obligation to declare them in violation of the equal protection clause of the Constitution and that it could not make a factual finding in the absence of a hearing.

Plaintiff-appellant urges under the law established in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) and *Zwickler* v. *Koota,* 389 U.S. 241 (1967), that, at the very least, he was entitled to declaratory, if not injunctive, relief against the enforcement of unconstitutional statutes.

ARGUMENT

POINT I

New York's 1902 Anarchy Statutes Are Unconstitutional in Violation of the First, Fifth and Fourteenth Amendments to the Constitution. Enforcement of These Anarchy Statutes in 1967 Represents Ex Post Facto Judicial Legislation Which Ignores Established Principles of Fair Warning and Stare Decisis as Well as Supersedure of Federal Law as to Acts of Sedition.

History of the Anarchy Statutes

Prior to the indictment in August, 1964, and the subsequent prosecution of William Epton[16] for his role in the 1964 Harlem riots, the 1902 anarchy statutes (P.L. §160-165) were moribund. They had not been invoked by the State of New York since *People* v. *Gitlow,* 234 N.Y. 132 (1922) aff'd. 268 U.S. 652 (1925).

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[16] *People* v. *Epton,* 19 N.Y. 2d 496, 227 N.E. 2d 829 (1967) cert. den. app. dism. 390 U.S. 29—rehearing den. 390 U.S. 976.

The Appellate Division of the New York Supreme Court stated in its opinion in *Gitlow*, 195 App. Div. 773, 783, 187 N.Y.S. 783 (1st Dept., 1921):

> "After the assassination of President McKinley by an anarchist on the 6th of September 1901, it was deemed that our laws were inadequate for the protection of organized government, and it appears by [New York State] Senate Document #26 of the 125th Session in 1902 that a committee of the Senate reported for enactment certain statutes creating and defining the crime of criminal anarchy, which . . . became sections 160-166 inclusive of the Penal Law."

The Appellate Division further quoted the report of the Senate committee which drafted the laws as saying (pp. 784, 785):

> "The assassination of the late President McKinley by an anarchist who avowedly had no personal grievance against his victim, aroused the people of the nation to the recognition of the fact which thoughtful observers had already appreciated some time before, namely, that immigration of recent years had made the United States the abiding place of numbers of foreigners who, without understanding of our institutions, had brought with them views and prejudices formerly unknown in this country, and doctrines which, if put into effect, would subvert not merely our or any particular form of government, but organized government everywhere.
>
> • • • • •
>
> "It is not a particular crime—the murder or attempt at murder of any particular individual—which is to

be prevented by additional penal legislation or for which additional punishment is to be provided, but rather the prevention of the spreading of doctrines hostile to the safety of our government and of all government, which inevitably tend to lead those who profess them to commit crimes or at least prepare them mentally for their commission. This problem—of reaching those who profess and teach the doctrines of anarchy, without themselves attempting or committing or inciting others to attempt or commit any particular crime—is a difficult one. All will agree, however, that anarchy, by which we mean the doctrine that organized government, of whatever nature whether republican or monarchial, should be overthrown by force, is a criminal doctrine, the teaching and spreading of which should be prevented by penal legislation.

* * * * *

"Organized government must be maintained. To attack it, to preach the doctrine that it should be overthrown, is not the right of anyone . . . When it ceases, every individual is the prey of his fellows and will have no rights at all except those he can maintain by force."

Thus, the New York State legislature in 1902 and the State judiciary in 1922 agreed that the meaning and intent of the New York anarchy laws were directed at the curbing of speech.[17] This Court was equally clear in such read-

[17] In effect, the New York anarchy laws revived in one state the spirit of the Federal sedition laws of 1789 (Act of July 14, 1798,

ing of the statutes in its affirmance in *Gitlow*. In that opinion, this Court followed the principle initially enunciated in *Schenck* v. *United States*, 249 U.S. 47 (1919), to the effect, as stated by Alexander Meiklejohn, "that freedom of speech of the American community may constitutionally be abridged by legislative action."[18]

In the New York Court of Appeals, Judge Pound dissented from the majority affirmance in *Gitlow* (234 N.Y. 154-158) on the grounds that a "left wing Socialist" who aimed to change the form of government and to substitute therefor another form of organized government could not properly be called an anarchist as intended by the 1902 legislature or as defined in Penal Law §§160-166. In this Court, affirmance brought the dissent of Justices Holmes and Brandeis which sought to extend the protection to speech afforded by the "clear and present danger" doctrine propounded by Holmes for the majority of the Court in *Schenck*.

The court below, in the instant case, found no difficulty, however, in formulating an entirely novel and updated interpretation of the 1902 anarchy statutes. Judge Friendly, author of the opinion, was able to rely on the Court of Appeals year-old opinion in *Epton* to support a 1967 redefinition of anarchy for application to communists

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1 Stats. at Large 596). The nation had repudiated the sedition laws within the first decades of the 19th century, not through any specific interpretation by this Court but through rejection by juries and finally through repeal by the Congress. For a discussion of this history see Appellant's Brief on Appeal in this Court in *Gitlow* v. *New York*, Oct. Term, 1922, No. 19 Vol. 95, pp. 41-97.

[18] Alexander Meiklejohn *Free Speech in its Relation to Self Government* p. 30, Harper and Row, New York, 1948.

(in *Epton*) or alleged black revolutionaries (as Fernandez is charged). As the court below said:

> "... that Court [*Epton*] ... reinterpreted the criminal anarchy statute 'in accordance with sound constitutional principles so as to preserve its constitutionality'" [A 63].

The hazards of legislation, especially by states and local governments, in the sensitive heartland of the First Amendment rights of the sovereign citizen, are thus amply documented in the present case. The vagueness and overbreadth of the language that must necessarily be employed in such legislation explain the divergence in interpretation of New York Penal Law §§161-166 as between the 1902 rationale of the New York Senate Committee, the 1922 opinion of the New York Court of Appeals in *Gitlow* and the affirmance by this Court in 1925, on the one hand, and the new meaning in the statutes discovered by the Court of Appeals in *Epton* in 1967. That new meaning was endorsed and accepted by the court below as of 1968 and is now before this Court. Such vagueness and overbreadth set the trigger for the further hazard of judicial *ex post facto* legislation, as in the instant case. Changing Supreme Court standards from 1919 to date foreclose a valid conviction in the light of the defenses of due process represented by *stare decisis*, fair warning and federal supersedure, as to state anarchy statutes passed in 1902.

Stare Decisis Ignored

The embarrassing contradiction in the interpretation of the New York anarchy statutes as between *Gitlow* and *Epton* is dismissed by the court below when it expresses

incredulity at appellant's complaint of uncertainty and illegality in these diverging interpretations:[19]

> "They [the appellants] contend that the Court of Appeals had no power in 1967 to give the statute a narrower reading than the same court had found in 1922 to be the intent of the legislature in 1902. We do not understand why; it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted all it could have" [A 63].

The acceptance of this premise by the court below following the *Epton* court, rejects the doctrine of *stare decisis* as well as what appears to the appellant as a direct holding by this Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). The latter decision was available to the *Epton* court at the time of its decision (May, 1967) but was rejected by it.

The reading into the statutes (§§161-166), for the first time in their sixty-five year history, of the requirement that they call for a showing of clear and present danger before the speech involved may be outlawed was a clear break with the doctrine of *stare decisis.* This Court's majority opinion read clear and present danger out of *Gitlow* in 1925. Said Judge Burke in his dissent in *Epton* (at p. 509):

> "The usual rule is that once a statute has been interpreted by the courts this interpretation becomes as

[19] To these various interpretations must be added the respondent District Attorney Mackell's interpretation of the statutes in June, 1967, as evidenced by his numerous press releases describing the crimes under the anarchy statutes of the appellant Fernandez and his co-defendants. [See Appendix C herewith.]

much a part of the enactment as if incorporated into the language of the act itself and is binding on subsequent courts in accordance with the rule of *stare decisis* and the doctrine of precedent (See McKinney's Cons. Laws of N.Y., Book 1, Statutes, §72, and the cases cited therein). Today, however, this principle is rejected on the ground that statutes are to be construed so as to preserve them from unconstitutionality, if possible (see *People* v. *Finkelstein,* 9 N.Y. 2d 342), a sound enough guide to construction, but only a guide, and out of place where construction is not called for, where we know from the language of a statute and from its history what it was the Legislature intended to achieve in enacting it. When as here, we have once ascertained what the Legislature sought to do in enacting a statute (and in the case of our criminal anarchy statute we can have no real doubt that our Legislature did in fact intend to make unlawful the mere advocacy of such doctrine, with no requirement that this advocacy constitute a clear and present danger) the nature of our function demands that we adhere to our earliest interpretation of the statute. We are not an extension of the Legislature, authorized to rewrite statutes through constant 'reinterpretation' designed to effectuate what we devine the Legislature *would* or *should* now desire the law to be."

Vague and Overbroad

As to *Keyishian,* the court below and the *Epton* court seemed to ignore what this Court there said about New York's anarchy laws [Penal Law §§160 and 161].

In *Keyishian,* this Court said that the proscription in Penal Law §161 as to "advocacy of criminal anarchy" as a

statutory definition gave the "possible scope of 'seditious' utterances and acts," "virtually no limit." This Court struck down the complicated provisions of New York Education Law §3021 primarily because of the reference to Penal Law §§160 and 161 for the definition there of "seditious." The state court chose to ignore what this Court said in *Keyishian* and innovated its own doctrine of expediency in statutory interpretation in order to read §§160 and 161 "in harmony with the Federal Constitution" —which in effect was *ex post facto* judicial legislation. In so doing, the state court also misapplied the logic of prior decisions in *Dennis* v. *United States,* 341 U.S. 494 (1951); and *Yates* v. *United States,* 354 U.S. 298, 312, 313 (1956); *Scales* v. *United States,* 367 U.S. 203 (1961); *Noto* v. *United States,* 367 U.S. 290 (1961).

The view of the court below on judicial restraint or federal abstention is particularly hard to understand since certainly that court had the benefit of this Court's language in *Keyishian.* The court below said:

> "In any event, if the Court of Appeals [in *Epton*] transcended the powers vested in it by the people of New York by narrowing its previous construction of the criminal anarchy statute, which we in no way intimate, this would be entirely a matter of state law and not one of federal concern" [A 63, 64].

In *Epton*—apparently on the principle that a court should construe a statute so as to preserve its validity at almost all costs—the Court of Appeals of the State of New York gave that state's 1902 anarchy statute a new and 180-degree different gloss from that applied by the same court in 1922 in *Gitlow* (affirmed by this Court in 1925).

In this reversal of itself, New York's highest court passes over principles of constitutional construction that decree stricter standards of interpretation when a state statute is challenged on grounds of vagueness than those applied to federal legislation. This Court has upheld still stricter standards where the state statute has "a potentially inhibiting effect on speech," for "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser" *Smith* v. *California,* 361 U.S. 147, 151 (1959).[20]

The three-judge federal court below joined the New York court in *Epton* in derogation of this same principle, long followed by this Court, that holds state legislation more accountable on grounds of vagueness than federal legislation, *Baggett* v. *Bullitt,* 377 U.S. 360, ftnote 370 (1964). This Court has created and traditionally maintained a buffer zone at the periphery of such Bill of Rights freedoms as are protected by the First Amendment, hedging those freedoms from invasion by state legislation. See *De Jonge* v. *Oregon,* 299 U.S. 353 (1937); *Herndon* v. *Lowry,* 301 U.S. 242 (1937); *Winters* v. *New York,* 333 U.S. 507, 509-10 (1948); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961); *Bouie* v. *City of Columbia,* 378 U.S. 347, 351-352 (1963); *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 428 (1963); *Baggett* v. *Bullitt, supra,* 372. Cf. *The Void for Vagueness Doctrine,* 109 Pa. L. R. 67, 81-84 (1960). Cf.

[20] In *Smith,* this Court has said

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional application of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution" (p. 151).

re federal legislation: *Watkins* v. *United States,* 354 U.S. 178, 197-99 (1957); *United States* v. *C.I.O.,* 335 U.S. 106, 140-42, 146, 150-53 [Rutledge concurring (1948)].

Dennis Distinguished

Thus, *Dennis* v. *United States,* 341 U.S. 494 (1951), where a federal statute patterned after New York's anarchy laws was upheld by this Court, can be distinguished from the case at bar on more than one ground.

1.) *Dennis* involved a federal statute, commonly known as the *Smith Act,* passed by Congress, not a state legislature, in 1940. As compared with state legislation in similar areas, this Court has found reasons to invalidate state legislation more generally than federal legislation over which it has a more flexible and responsive power of control.[21]

This point was further underscored in *Yates* v. *United States,* 354 U.S. 298, 319 (1957) where this Court said:

> "We need not, however, decide this issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so, we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had been construed as terms of art carrying a special and limited connotation."

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[21] Says the author in 109 Pa. L.R. 67, 83 "Except for §4 of the Lever Act involved in Cohen (*United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81 [1921], . . . no federal statute has ever been declared unconstitutional for vagueness."

The "judicial measure of constitutional applicability" (*Dennis*, p. 515) should certainly depend on the intent of the legislature at the time it passed the legislation—not judicial inspired reasoning which can find no basis in law at the time of the passage of the legislation or of its latest judicial interpretation but one.

2.) This Court was construing the *Smith Act* after Congress had passed it in 1940 with full knowledge of the doctrine of "clear and present danger" first enunciated by this Court in *Schenck* v. *United States*, 249 U.S. 47 in 1919. (See *Dennis*, p. 503.) Although patterned on New York's anarchy statute, the *Smith Act* was passed by Congress with the Communist Party and Communist doctrine in mind (*Dennis*, p. 547). The New York legislature, acting in 1902, could know nothing of the black power movement in the sixth decade of the 20th century nor could it anticipate with any degree of definiteness what conduct the District Attorney of Queens County would seek to proscribe as criminal by the indictment in this case.

Since *Keyishian*, five three-judge federal courts have rejected the *Epton* rationale and followed *Keyishian*, contrary to the instant case, in declaring state sedition and anarchy statutes invalid as unconstitutionally vague and overbroad. *Ware* v. *Nichols*, 266 F. Supp. 564 (N.D. Miss., 1967); *Carmichael* v. *Allen*, 267 F. Supp. 985 (N.D. Ga., 1967); *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky., 1967); *Harris* v. *Younger*, 266 F. Supp. 564 (C.D. Cal., 1968) [Prob. Juris. noted Jan. 13, 1969]; *Baker* v. *Binder*, 274 F. Supp. 658 (W.D. Ky., 1967). See *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 Cal. L. Rev. 702 (May, 1968); *Variation on the Theme of Dom-*

browski v. *Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights,* Wisconsin L. R. 1968, p. 369.

Supersedure

In speaking of the advocacy of overthrow of the government by force and violence, the New York anarchy statutes [Penal Law §§160, 161] seek to invoke for the state government an unconstitutionally broad sweep of power. The "government" under the statutes is that of the United States as well as the State of New York.[22]

> "it is fair to assume that the legislature had in mind the protection of this state, the states of the Union and of the Union itself. We may fairly assume that the legislature would think of self-preservation rather than the protection of foreign governments. When, therefore, in these sections, it used the words 'organized government' it must have referred to all organized government in this country, whether it be that of city, state or nation. To advocate the destruction of the government of the City of New York, or of the United States by force or by unlawful means . . . is a violation

[22] In the record below, there is no question that the District Attorney intended to charge Fernandez and his co-defendants with advocacy of overthrow of the government of the United States as charged in the original June, 1967, indictment. (See Appendix C.)

Furthermore, the thrust of this instant complaint is against the statute itself, not merely the somewhat narrowly drawn superseding indictment which charges the defendant with acts directed solely against the state government. Says Professor Paul Freund in *The Supreme Court and Civil Liberties,* 4 Vanderbilt L. Rev. 533, 537 (1951)

> ". . . in matters of civil liberty a prior restraint is more vulnerable than penalties after the act, and that a law abridging civil liberties is to be judged on its face."

of these sections of the penal law." *People* v. *Gitlow*, 234 N.Y. 132, 136 (1922).

In *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1955), this Court has ruled that the *Communist Control Act of 1954* [including the *Smith Act*] evinces "a congressional plan which makes it reasonable to determine that no room has been left for the state to supplement it. Therefore a state sedition statute is superseded regardless of whether it purports to supplement the federal law." Thus it is clear that, if §§160 and 161 were ever constitutional, the holding in *Nelson* establishes federal supersedure of state law in the field of sedition. And courts in many jurisdictions have accepted and followed this interpretation. *Commonwealth* v. *Gilbert*, 334 Mass. 71, 134 N.E. 2d 13 (Sup. Jud. Cty., 1956); *Commonwealth* v. *Hood*, 334 Mass. 76, 134 N.E. 2d 12 (1956); *Commonwealth* v. *Dolson*, 183 Pa. Super. 339, 132 A. 2d 692 (1957); *Braden* v. *Commonwealth*, 291 S.W. 843 (Ky., 1953); *Albertson* v. *Millard*, 345 Mich. 519, 77 N.W. 2d 104 (1956); *State* v. *Jenkins*, 236 La. 300, 107 So. 2d 648 (1958) but see *State* v. *Cade*, 244 La. 534, 153 So. 2d 382 (1963); *State* v. *Levitt*, 203 N.E. 2d 821 (Ind., 1965) and *Levitt* v. *Dillon*, Civ. Action 1 P. 65-C-462 S.D. Ind. [dismissed by stipulation].

The Court of Appeals in *Epton* and the court below in endorsing that opinion, effectively overruled this Court's decision in *Nelson* by stating "subsequent pronouncements by the Supreme Court have restricted the scope of the *Nelson* opinion and have left the defendant's contention [as to supersedure] without merit." There is a dictum in *Uphaus* v. *Wyman*, 360 U.S. 72 (1959), cited by the *Epton* court that this Court was not of the same mind there as in *Nelson*, i.e., that the *Smith Act* supersedes state sedition

legislation covering the same conduct and proscribing advocacy of overthrow of local, state and national government as does §§160 and 161.[23]

Uphaus said of *Nelson*: "The opinion made clear that a State could proceed with prosecutions for sedition against the State itself."[24] Since *Nelson* said precisely the opposite and since *Uphaus* concerned a legislative investigation, —nor did this Court there have occasion to construe or review any legislation,—it is here submitted that *Uphaus* should be confined to its facts and that the better view be adopted, i.e. that *Nelson* meant what it said when it analysed how the federal government had effectively occupied the field with its legislation in the area of sedition [*the Smith Act*, 18 U.S.C. §2385, *the Internal Security Act of 1950*, 50 U.S.C. §781 et seq. and *the Communist Control Act of 1954*, 50 U.S.C. (1955 Supp.) §481] and when it said

"Sedition against the United States is not a *local* offense. It is a crime against the *Nation*" (p. 505).

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[23] See dissent of Judge Wisdom in *Dombrowski* v. *Pfister*, 227 F. Supp. 556, 600 (E.D. La., 1964) rev'd on other grds. 380 U.S. 479 (1965).

[24] In New York, the legislature has provided a battery of crimes and offenses which could be invoked to prevent or penalize overthrow or attempts at overthrow of the New York State government. Penal Law sections effective in 1967 which could conceivably cover the alleged criminal acts of the appellant and his co-defendants are: Assault §240-245; Attempt §260; Conspiracy §580; Disorderly Conduct §722; Homicide §1040; Mob Violence §1390; Disturbing Lawful Meetings §1470; Attempting to Prevent Officer from Performing Duty §1824; Resisting Officer §1825; Resisting Public Officer in the Discharge of His Duty §1851; Explosives and Combustibles §1894; Endangering Life by Maliciously Placing Explosives Near Building §1895; Making and Disposing of Dangerous Weapons §1897; Riot §§2090, 2091; Unlawful Assemblies §§2092, 2093, 2094, 2095. These sections were repealed by the enactment of a new penal law effective September 1, 1967, but the substance of the crimes are generally carried over to the new law.

and further

> "Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned by Mr. Justice Jackson [multiplicity of tribunals and diversity of procedures], but the added conflict engendered by different criteria of substantive offenses" (p. 509).[25]

Judicial Ex Post Facto Legislation In Futuro

The court below further held that *Epton* not only validated §§160 and 161 but also upheld the new Penal Code §240.15.[26] This holding can only be gratuitous since the new statute was not squarely before the court below nor do we have any holding on its meaning or effect from the New York courts at this writing, unless *Epton* can be construed as the state's highest court anticipatorily legislating an anarchy statute later ratified by legislative action—an apparent breach of the doctrine of separation of powers.[27]

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[25] After *Nelson*, Congress did not modify the rule and in fact, proposed federal legislation to change the *Nelson* holding failed passage in the 86th Congress (1958). See HR 305, 86th Cong., 1st Sess.

[26] Query: If §§160 and 161 were constitutional and valid on May 17, 1967 [the date of the *Epton* decision], why did the state legislature pass a new anarchy statute effective September 1, 1967, which, *inter alia*, excluded action against the federal government and confined the target for the illegal conduct described to state governments only? Judge Friendly does not credit the New York State legislature with any intent. The new law was not necessary and reflects no change in the law, says the court below.

[27] Judge Friendly's opinion suggests that the constitutionality of Penal Law §240.15 could be before this Court in this case. Appellant does not concede the constitutionality of the new statute, maintaining that it too suffers from overbreadth and vagueness and that it has been superseded by federal law.

No Fair Warning

The court below strains at a distinction between the case at bar involving anarchy charges and *James* v. *U.S.*, 336 U.S. 213, 225 (1961). In *James*, this Court noted its previous decisions had held that embezzled funds were not taxable; the Court then reversed this earlier holding, but refused to apply its new judicially-arrived-at rule retroactively—that would be unfair. With respect to the present case, the court below says:

> "No court of New York had ever told the defendant they could engage in the type of activity charged in the indictment with impunity" [28] [A 65].

The plaintiffs, however, had been told by this Court that *Gitlow* was no longer the law in *Dennis* v. *United States*,

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[28] Judge Friendly challenges the allegations of the complaint—minimizing its thrust on an *ad hoc* basis saying

> "Neither the complaints nor the moving affidavits allege that plaintiffs entertained the beliefs their lawyers now ingeniously imputed to them . . . In any event this point, which would require an examination of defendants' state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record . . ." [A 65, 66].

Mr. Justice Brennan spoke for this Court, however, in *Bouie* v. *City of Columbia*, 378 U.S. 347, 355, when he said in a footnote

> "We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibition must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants."

Said this Court in *Dombrowski* v. *Pfister*, 380 U.S. 479, 486:

> "For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

341 U.S. 494, 507 (1951), which opinion was later to be confirmed by this Court in *Keyishian, supra.* They had further been told that they could not be prosecuted by a state for the expression of seditious ideas, *Pennsylvania* v. *Nelson, supra.* They were entitled to rely on their rights under the First Amendment in the absence of definitive language from the New York courts. *Bouie* v. *City of Columbia,* 378 U.S. 347 (1963); *Pierce* v. *U.S.,* 314 U.S. 306, 311 (1941). Is the difference between *James* and appellant—to wit: that the former was a proven embezzler and the appellant a black American citizen charged with advocacy of unpopular ideas about government—sufficient to give the benefit of the law to the former and deny it to the latter? Since they were both charged with criminal statutes newly court interpreted, are they not, at the very least, equally entitled to be relieved of punishment applied retrospectively?

The present case is better distinguished from *James* in the light of the plain language of the First Amendment. No words there suggest that the plaintiff-appellant—or any other citizen—must wait to be told by the courts of the State of New York—or by the court below—what "type of activity" he may "engage in . . . with impunity."

POINT II

The Provisions of the New York State Judiciary Law Establish Subjective Criteria for the Selection of Grand Jurors Along With Discriminatory Economic Criteria of Ownership of Property and Are Violative of the Equal Protection Clause of the Fifth Amendment as a Matter of Law.

The Grand Jury which originally indicted the defendant Fernandez in June, 1967, was impanelled under old Judiciary Law §§596 and 661. Section 596(3) states unequivocally that as a qualification to serve, a Grand Juror must "[B]e the owner" or the spouse of the owner "of real or personal property of the value of two hundred and fifty dollars." Section 596(6) requires that he "[B]e intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly." [20] Section 661 is a questionnaire embodying a question as to the $250.00 property qualification.

This same Grand Jury was still sitting when the superseding indictment challenged in the instant case was returned in September, 1967, after the effective date of changes in the law that responded, in part, to the questions about the fairness and legality of these statutes raised here. As of September 1, 1967, the New York legislature eliminated the $250.00 property requirement. The legislature

[20] Of course, this means that the County Clerk under the law must decide whether or not the prospective Grand Juror is the owner of the required property—this is easily susceptible to objective proof but is a monetary qualification. Not as easy to imagine is how the County Clerk determines whether or not the prospective Grand Juror is "intelligent" or of "good character" or "well informed."

retained, however, the §596(6) requirements as to intelligence and good character and added a section 609(1) which requires the County Clerk of each county to "make a special investigation of persons qualified to serve as trial jurors."

It would appear from these sections that, at least at the time the Grand Jury which indicted the appellant herein was selected, there was a $250.00 property requirement and, further, that the County Clerk was empowered to decide which prospective jurors met the intelligence and good character requirements. The statutes specified no standards to assure a defendant—particularly a poor, black or Puerto Rican defendant—that the Grand Jury which indicted him represented a fair cross-section of the community.

This court has recognized the "invaluable function" served by the State Grand Jury "as a primary security to the innocent against hasty, malicious and oppressive persecution," and by "standing between the accusor and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason and was dictated by an intimidating power or malice or illwill." *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962), quoted in *Chestnut* v. *New York,* 370 F. 2d 1, 3 (C.A. 2, 1966), cert. den. 386 U.S. 1009.

The arbitrary power granted to the County Clerk to make his subjective determination as to who should be selected as Grand Jurors is similar to the power of state election officials that was struck down by this Court in *Louisiana* v. *United States,* 380 U.S. 145 (1965). A Grand Jury should represent a cross-section of the community.

Cf. *Rabinowitz* v. *United States,* 366 Fed. 2d 34 (C.A. 5, 1966); *Thiel* v. *Southern Pacific,* 328 U.S. 217 (1946); *Labat* v. *Bennett,* 365 F. 2d 698 (C.A. 5, 1966); *Whitus* v. *Georgia,* 385 U.S. 545 (1967).

The opinion of the court below in dismissing the complaint and endorsing the constitutionality specifically of the $250.00 property qualification is difficult to understand for the court itself says:

> "We have little doubt that, despite the decision of this court in *United States* v. *Foster,* 83 F. Supp. 197 (S.D. N.Y., 1949), cf. *Fay* v. *New York,* 332 U.S. 259, 291-94 (1947), application of even a modest property qualification for grand jurors might now be held unconstitutional, cf. *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1946); *Labat* v. *Bennett,* 365 F. 2d 689, 723 (5 Cir., 1966); cf. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), and New York has acted wisely in abolishing it" [A 68].

The court below sought to minimize its own conclusion that an imposition of a property requirement would be unconstitutional by referring to an affidavit of the County Clerk—sworn to on information and belief [A 42] *not knowledge* to the effect that in practice he had not followed the law.

This summary dismissal of plaintiff's complaint on the basis of a lone affidavit based on alleged facts neither open nor available to rebuttal by the planitiff-appellant does not seem an adequate or judicial answer to a challenge to a statute on its face. By its ruling, the court below found there was a factual issue, but disposed of it arbitrarily without taking evidence—satisfied with the ex-parte-belief

affidavit of a County Clerk—in what is certainly a denial of due process on the very premise stated by the court: "that even a modest property qualification for Grand Jurors might now be held unconstitutional" [A 68]. Nor is this a mere cavil or attempt to secure an abstract opinion in the absence of direct injury from enforcement. See *Poe* v. *Ullman*, 367 U.S. 497, 504, 505 (1961).

Appellant Fernandez alleged in his complaint that he, a black Afro-American, was aggrieved by the conduct of the District Attorney and the Attorney General in curtailing his peaceful protest activities. The economic criteria for questioning citizens as to their property ownership amounts to racial discrimination because, as all social and economic indices show, the distribution of Negro citizens on every scale of socio-economic status is inverse to the distribution of white citizens. The discrimination is inherent in the standards set by the legislation. Thus, the minimum property ownership requirement itself excludes half of the New York City Negro and Puerto Rican population from consideration as Grand Jurors while excluding not much more than ten percent of the white population.[30] The mere statement that this is not enforced by one County Clerk cannot be decisive in any way in the absence of an evidentiary hearing. Cf. *Whitus* v. *Georgia, supra.*

Discrimination of a similar nature is provided for in the subjective standards which the clerk is empowered to apply in selecting Grand Jurors. Thus the 47 percent of the Negroes who did not finish grammar school will not be

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[30] "Survey of Consumer Expenditures, 1960-1961," Supplement 2, *Bureau of Labor Statistics Report*, No. 237-93, June, 1966: "Consumer Expenditures and Income, Cross Classification of Family Characteristics," Table 22b, p. 69.

found "intelligent" or "well informed" by the County Clerk who will have doubtless enjoyed the benefit of a high school education or better as do more than 60 percent of the white population."[31]

The court below ignored the discriminatory aspects of the Grand Jury legislation which appear on the face of the legislation declaring that plaintiff-appellant's remedy, if any, was an appeal in the New York courts and for review in this Court.

A brief review of the case law does not support the probability of success along these lines. See *People* v. *Agron*, 10 N.Y. 2d 130 (1961); *People* v. *Dessaure*, 299 N.Y. 126, 132 (1949) cert. den. 337 U.S. 949; *People* v. *Prior*, 294 N.Y. 405 (1945); *People* v. *Horton*, 18 N.Y. 2d 355 (1966); *Chestnut* v. *New York*, 370 Fed. 2d 1 (C.A. 2, 1966), cert. den. 386 U.S. 1009; *People* v. *Thomas*, 53 Misc. 2d 427 (Onondaga Cty., 1967); *People* v. *Ruppert*, 53 Misc. 2d 845, 279 N.Y.S. 2d 895 (Westchester Cty., 1967); *People* v. *Cohen*, 54 Misc. 2d 873, 283 N.Y.S. 2d 817 (Kings Cty., 1967); *People* v. *Smith*, 54 Misc. 2d 902, 283 N.Y.S. 2d 594 (Genesee Cty., 1967); *U.S. ex rel. Epton* v. *Nenna*, 281 F. Supp. 388, 390 (S.D.N.Y., 1968).

This Court has recently said in rejecting the doctrine of abstention urged by the court below that the federal courts are proper forums for the adjudication of human rights under the federal constitution, *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967). Cf. *Baggett* v. *Bullitt*, 377 U.S. 360, 375, 376, ftnote and cases there collected (1964). Nor is the Equal Protection Clause shackled to the political theory of

[31] *United States Census of Population, 1960*, United States Summary, General Social and Economic Characteristics, PC (1) 1C. Table 76, p. 1-207.

a particular era. Just as the constitution requires equal participation for all voters absent any economic requirement [*Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668, 669 (1966)] so there are similar requirements for the equal and democratic selection of Grand Jurors under legislation which does not give leave to the County Clerk to exclude a large portion of the poor at his option.

POINT III

Plaintiff's Challenge in the Federal Court of Unconstitutional State Anarchy Statutes and State Legislative Procedures for Selecting Grand Jurors Entitled Him to Declaratory Relief and/or an Injunction if Necessary.

Plaintiff-appellant has launched a double-barrelled attack on the statutes responsible for his indictment in the New York Queens County Court in 1967 for the crimes of anarchy and conspiracy to commit arson in the third degree.

He alleges, in effect, that the entire prosecution is an infringement of his rights to speak and associate and protest under the First Amendment and that the invocation of a 45-year-old, apparently moribund, anarchy statute underlines the discriminatory nature of the attack on him and his fellow criminally-charged defendants for asserting their First Amendment rights.[32] In further support of this al-

[32] For a discussion of black power advocacy and its relationship to criminally punishable speech and the manner in which the courts have invoked sedition statutes in recent years against protest of the black community and its spokesmen see *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 Cal. L.R. 702 et seq. (May 1968).

legation, plaintiff complains of the composition of the Grand Jury which indicted him as not being composed of a cross-section of the community—and so not a jury of his peers, economically or racially—because, perforce, the statutory basis for the selection of Grand Jurors mandates an improper objective economic test ($250.00) and, improper subjective standards of selection to be applied by the County Clerk.

He further asserts he has at least made out a prima facie case [the allegations of which were untested by an evidentiary hearing in the lower court at the time that court dismissed his complaint] that he is entitled to declaratory and injunctive relief from improper prosecution.

Under the teachings of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), he has shown 1.) that his prosecution has been brought under statutes [§§160 and 161], vague and overbroad on their face, and 2.) that such prosecution has been brought in bad faith, for the purpose of discouraging and intimidating the appellant and others in the exercise of First Amendment rights [*Dombrowski,* pp. 489-92]. [See also *Variations on the Theme of Dombrowski* v. *Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights,* Wisconsin L. Rev., 1968, p. 369.]

Necessarily, in examining the question of plaintiff-appellant's request for declaratory and/or injunctive relief against the effect of unconstitutional statutes, the issue arises as to whether or not this is an appropriate case for federal intervention.

In the face of a clearly unconstitutional statute, this Court has abstained from granting relief. *Douglas* v. *City*

of Jeanette, 319 U.S. 157 (1943). Cf. *Poe* v. *Ullman*, 367 U.S. 497 (1961). Mr. Justice Fortas has said "*Dombrowski* is strong medicine. It involves the interposition of federal power at the threshold stage of the administration of state criminal laws." [33]

There is language, however, in recent decisions of this Court that the federal system cannot shirk its obligation to exercise its supervisory power in the implementing of constitutional doctrine, particularly in issues involving the First Amendment at the threshold stage of litigation. This Court said, in *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967):

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give the respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly escape from that duty is not permissible merely because state courts also have the solemn responsibility equally with the federal courts, ' . . . to guard, enforce and protect every right granted or secured by the Constitution of the United States . . . ' (*Robb* v. *Connally*, 111 U.S. 624, 637)."

In *Zwickler*, where the assertion was made that the statute challenged was not void for vagueness, but for overbreadth, this Court rejected the doctrine of abstention holding that where

> "the attack upon the statute on its face is for repugnancy to the First Amendment . . . to force the

[33] *Cameron* v. *Johnson*, 390 U.S. 611, 614 (dissent) (1968).

> plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect . . . " (at p. 252).

The teaching of *Zwickler* is that it is only where there are "special circumstances" which would warrant abstention should such doctrine be applied, and that otherwise it is error for the federal court to avoid passing on the issue.

In the case at bar, appellant has challenged the anarchy and Grand Jury statutes on their face and in the preceding argument (Points I and II) has demonstrated the reason why this Court should declare the patently unconstitutional legislation invalid. The anarchy statutes clearly abridge freedom of expression and, as applied in conjunction with the Grand Jury statutes, they effectively succeed.

This is not to withdraw appellant's request for injunctive relief. Declaratory relief, however, would appear to be sufficient and plainly in order under all the circumstances.[24]

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[24] Appellant is aware of the issue as to whether or not 42 U.S.C. §1983, pursuant to which plaintiff lodged his complaint would authorize the injunction for which he also asks, in view of 28 U.S.C. §2283. See *Dombrowski*, *supra*, pp. 484, 497; *City of Greenwood* v. *Peacock*, 384 U.S. 808, 829, 830 (1966). Cf. *Cameron* v. *Johnson*, 390 U.S. 611, 614 (1968), 8 A.L.R. 3d 301 et seq. *Federal Injunction and State Enforcement of Invalid Criminal Statutes*, 65 Col. L.R. 647 (1965). It would seem, however, at this juncture that declaratory relief would effect plaintiff-appellant's purpose in calling off the instant prosecution.

Conclusion

This Court should reverse the judgment of dismissal of the District Court and declare the statutes challenged in contravention to the Constitution of the United States.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Plaintiff-Appellant
Fred Fernandez

ERRATUM

Erratum in separate appendix heretofore filed with the Court on January 24, 1969 (being a copy of Judge Friendly's opinion for the three-judge court below)

P. 63, line 4, "*People* v. *Gitlow, supra,*" should read "*People* v. *Epton, supra.*"

APPENDIX A

Statutes Involved

New York Penal Law (McKinney's Consolidated Laws of New York)

§160. *Criminal anarchy defined*

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

§161. *Advocacy of criminal anarchy*

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with

intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

New York Judiciary Law (McKinney's Consolidated Laws of New York)

§ 596. *Qualifications of jurors*

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of

the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section.

§ 609. *Grand jurors in the counties within the city of New York*

1. Selection of grand jurors. The annual list of persons to serve as grand jurors at the terms of the supreme court for the trial of criminal actions within the city of New York, for each year beginning January first and expiring December thirty-first following, shall be made up in the following manner: the county clerk of each county shall make special investigation of persons qualified to serve as trial jurors. The county clerk shall require each applicant for service as a grand juror to record the fingerprints of his two hands in such manner as to contain legibly the points (including the deltas and cores) necessary to afford accurate and complete classification by the state department of correction. Such fingerprints shall be promptly forwarded to the central bureau of criminal identification, records and statistics of such department at Albany with the request that all information on file as to the previous record, if any, of such person, be forthwith transmitted to the county clerk. Upon receipt of such fingerprints, it shall be the duty of the commissioner of correction to cause them to be classified and to cause his records to be searched for information as to the previous record, if any, of the person to whom such fingerprints pertain. If there is no previous record, he shall report that fact. If there is such previous record, he shall promptly transmit to the county clerk full information thereon. The report of the commissioner of correction certifying to the previous criminal record of any person shall be presumptive evidence of the facts so certified. If the commissioner of correction shall report to the county clerk the previous criminal record of an applicant for grand jury service, the county clerk shall not place the name of such person upon the grand jury

list if such person's record contains a conviction for a felony or for a misdemeanor involving moral turpitude. If such commissioner shall report to the county clerk a previous criminal record of any such person containing a conviction for a felony or a misdemeanor involving moral turpitude, the court clerk shall immediately transmit such information to the district attorney, together with any questionnaire that may have been signed by such person in accordance with rules promulgated by the appellate division of the supreme court pursuant to the provisions of section five hundred ninety-two of the judiciary law.

The county clerk shall make a list of those persons who, this investigation shows, are suitable to serve as grand jurors. He shall note upon such list the name of each person whose record shows a conviction for a misdemeanor which in his opinion does not involve moral turpitude. The list shall contain the names of at least the maximum number of persons permitted for the annual grand jury list. The annual grand jury lists shall be selected therefrom by the respective county jury boards.

The number of persons to be selected annually to serve as grand jurors in the counties within the city of New York shall be fixed by rules of the appellate divisions of the supreme court.

2. County jury boards. The county jury boards shall meet annually at the office of the respective county clerks during the month of November on the day fixed by the county boards. The presiding justice of the appellate division of the supreme court, or his designee from among the associate justices of the appellate division, shall act as chairman; in case of the absence of such presiding justice, the members present, if a quorum, shall elect one of their number chairman. Two members exclusive of the county clerk, shall constitute a quorum for the transaction of business, and if a quorum be not present the board shall adjourn from day to day until a quorum is obtained. The county clerks shall act as secretaries of the respective

boards. The county boards may further convene from time to time to fill any vacancies in the lists of grand jurors or to add such number of names thereto as are necessary to make up the full complement of jurors.

3. Summoning; non-attendance. Grand jurors shall be summoned in the same manner as trial jurors and shall be subject to the same penalties as provided in article one hundred and sixteen of the penal law.

4. Drawing of grand jury. Grand jurors shall be drawn by the county clerks of the respective counties under the supervision of the judge or judges of a court of record resident or sitting in such county designated by the appellate division. The method of drawing and the keeping of minutes thereof shall be governed by rules of the appellate division of the supreme court in the departments in which the counties are located.

§ 661. Form of questionnaire

The questionnaire to be filled out by prospective jurors shall contain the substantially following information and shall be in such form as the commissioner may prescribe.

Date Result By Whom Examined

QUALIFICATIONS TO SERVE AS JUROR TO BE FILLED OUT IN OWN HANDWRITING | Do not write in this box

The undersigned certifies to the following answers | Explanations or remarks concerning answers may be made in ruled box on reverse side :

A person who knowingly makes a false statement of a material fact in these certificates is guilty of a misdemeanor, punishable by fine or imprisonment.

1 Print name in full.....
First Name Middle Name Last Name

2 Date of birth.....
Mo Day Year

3 Residence..... Street..... City..... Town or Village..... Tel No. .....

4 How long living at present address..... How long in N. Y. State..... In County.....

5 Give any other name you have used or been known by.....

6 Place of Birth..... If not American born, how became citizen..... When naturalized..... Where.....
City State

7 Education: Primary, High School, College, degrees, special studies, etc.....

8 Occupation..... Employed at present..... Business address..... P.O. Zone No..... Tel No.....

9 Firm name of employer..... How long in present employment.....

10 What other employment during past six years .....

11 Wife's name..... Her occupation..... Her firm..... Her business address.....

12 Do you or your wife own property (such as bank account, furniture, insurance, trust funds, stocks, bonds, mortgages, land, etc.,) worth $250.....

13 Ever served as a juror.....

14 Are you physically disabled or incapacitated..... Is your hearing or eyesight so impaired that you could not intelligently follow a case in court.....

15 Ever had a motor vehicle license revoked or suspended..... Ever been convicted of a criminal charge.....

16 If your answer to any question on lines 14 or 15 is "Yes", give all particulars.....

17 Any judgments outstanding against you..... Nature of action in which obtained.....

18 Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death.....

19 In what months of the year between September 1 and June 30 would your prefer to serve (Name two or more months).....

THE MAKING OF A FALSE STATEMENT OF A MATERIAL FACT IN THIS QUESTIONNAIRE IS A MISDEMEANOR, PUNISHABLE BY FINE AND IMPRISONMENT.

The foregoing answers are true in all respects

Sign here .....

Do not write below this line

N	E	O	S	D

A PERSON WHO KNOWINGLY MAKES A FALSE STATEMENT OF A MATERIAL FACT IN THIS QUESTIONNAIRE IS GUILTY OF A MISDEMEANOR, PUNISHABLE BY FINE OR IMPRISONMENT

Explanation of any answers on opposite side of this form, or remarks, may be made here

I, ——— do hereby certify:

I do not dwell or lodge nor do I have or maintain a dwelling or lodging in the County of ——— for the greater part of the time between the first day of October and the thirtieth day of June next thereafter, and I am not a resident of said County; but I reside permanently at ———

City of ———, County of ———

State of ———, and have resided there since ———

Examined ——— —19— by ———

I, ——— do hereby certify:

I am entitled to and claim exemption / I am disqualified from doing jury service for the following reason ———

Examined ——— —19— by ———

NAME ADDRESS BIRTH DATE INDEX NO.

RECORD OF JURY SERVICE

Term Drawn	Court	Days In Attendance	Days Actually Served	If Excused Reason	Date Placed in Wheel	Term Drawn	Court	Days In Attendance	Days Actually Served	If Excused Reason

CHANGES OF ADDRESS

New Address

Since

Added L.1954, c. 305, § 1; amended L.1955, c. 797, § 2, eff. July 1, 1955. L.1955, c. 797, § 2, eff. July 1, 1955, inserted "substantially" in opening paragraph.

Library references: Jury ⇐38; C.J.S. Juries § 134 et seq.

APPENDIX B

SUPREME COURT

CRIMINAL TERM—QUEENS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

HERMAN BENJAMIN FERGUSON,
ARTHUR HARRIS,
MILTON ELLIS, a/k/a Clarence Milton Ellis,
MERLE STEWART,
HAMPTON WOODWARD ROOKARD,
URSULA VIRGINIA WEST,
MANDOLA MC PHERSON,
GEORGE SAMUELS,
ABRAHAM C. TAYLOR,
RAYMOND SMITH,
FRED FERNANDEZ,
AL HAYNES, a/k/a Edward Albert Haynes,
JOHN ANDERSON, a/k/a John Shabazz,
HARRIET NOEL,
MICHELLE KAUROUMA,
MOREKA KAUROUMA,
MAX STANFORD, a/k/a Maxwell Curtis Stanford,

Defendants.

NO. 1224-67 INDICTMENT FOR:

ADVOCACY OF CRIMINAL ANARCHY,

CONSPIRACY TO COMMIT THE CRIME OF ADVOCACY OF CRIMINAL ANARCHY as to ALL DEFENDANTS.

CONSPIRACY TO COMMIT THE CRIME OF ARSON IN THE THIRD DEGREE as to HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MILTON

ELLIS, a/k/a Clarence Milton Ellis, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MANDOLA MC PHERSON, GEORGE SAMUELS, ABRAHAM C. TAYLOR, RAYMOND SMITH, FRED FERNANDEZ, AL HAYNES, a/k/a Edward Albert Haynes and MAX STANFORD, a/k/a Maxwell Curtis Stanford.

PERMITTING PREMISES TO BE USED FOR ASSEMBLAGES OF ANARCHISTS as to MERLE STEWART and GEORGE SAMUELS.

POSSESSION OF DANGEROUS WEAPON AS A FELONY as to HERMAN BENJAMIN FERGUSON.

POSSESSION OF DANGEROUS WEAPON AS A MISDEMEANOR as to HERMAN BENJAMIN FERGUSON (1 count), MILTON ELLIS, a/k/a Clarence Milton Ellis (2 counts), ARTHUR HARRIS (2 counts), MERLE STEWART (2 counts), HAMPTON WOODWARD ROOKARD (2 counts), MANDOLA MC PHERSON (1 count), GEORGE SAMUELS (1 count).

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendants of the crime of ADVOCACY OF CRIMINAL ANARCHY, committed as follows:

The defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the Grand Jury, on or about and between October 1st, 1965 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, by word of mouth and writing did advocate, advise and teach the duty, necessity and propriety of over-

throwing organized government by assassination of the executive officers of the government and by force and violence.

That in pursuance and in furtherance thereof, the defendants aforenamed, acting in concert and being aided and abetted by accomplices known and unknown to the Grand Jury, on or about and between October 1st, 1965 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, did print, publish, edit, issue and did knowingly circulate, distribute, and display papers, documents, books and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means.

That in pursuance and in furtherance thereof, the defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the Grand Jury, on or about and between October 1st, 1965 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, did organize and help to organize and did become members of and did voluntarily assemble with groups and assembly of persons formed to teach and advocate the doctrine that organized government should be overthrown by force, violence or any other unlawful means.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant MERLE STEWART of the crime of PERMITTING PREMISES TO BE USED FOR ASSEMBLAGES OF ANARCHISTS, committed as follows:

The defendant MERLE STEWART, on or about and between June 1st, 1966 and June 19th, 1967, in the County of Queens, as owner, agent, tenant or occupant, wilfully and knowingly permitted premises 111-29 179th Place, in

the County of Queens, to be used for assemblages of anarchists.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant GEORGE SAMUELS of the crime of PERMITTING PREMISES TO BE USED FOR ASSEMBLAGES OF ANARCHISTS, committed as follows:

The defendant GEORGE SAMUELS, on or about and between February 25th, 1966 and June 19th, 1967, in the County of Queens, as owner, agent, tenant or occupant, wilfully and knowingly permitted premises 120-03 New York Boulevard, in the County of Queens, to be used for assemblages of anarchists.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendants of the crime of CONSPIRACY TO COMMIT THE CRIME OF ADVOCACY OF CRIMINAL ANARCHY, committed as follows:

The defendants aforenamed, acting in concert and being aided and abetted by accomplices known and unknown to the Grand Jury, on or about and between October 1st, 1965 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, knowingly, wilfully, corruptly and unlawfully conspired, confederated and agreed with each other and with persons known and unknown to the Grand Jury, to commit the crime of advocacy of criminal anarchy.

And in furtherance of said conspiracy, and in order to effect the objects thereof, the following overt acts, among others, were done and performed by certain of the parties to said unlawful conspiracy, that is to say:

OVERT ACTS

1. On or about December 9th, 1965, the defendants, acting in concert, formed the Jamaica Rifle and Pistol Club to be used as a cover and as a front for the legal possession of weapons.

2. On or about and between October 1st, 1965 and June 19th, 1967, the defendants, acting in concert, obtained an indeterminate amount of rifles, shotguns and pistols.

3. On or about and between July 1st, 1966 and June 19th, 1967, the defendants acting in concert, in the County of Queens, attended classes and received instructions in Aikido and Mayhem.

4. On or about July 29th, 1966, the defendants acting in concert, obtained and stored printing equipment in the County of Queens.

5. On or about May 30th, 1967, the defendant, HERMAN BENJAMIN FERGUSON printed an indeterminate amount of a newsletter "TOTAL RESISTANCE".

6. On or about September 13th, 1966, the defendant, HERMAN BENJAMIN FERGUSON, in the County of Queens, printed and issued literature indicating plans for pulling down high tension wires and action involving deadly force against the police.

7. On or about October 4th, 1966, the defendant, HERMAN BENJAMIN FERGUSON, in the County of Queens, printed and issued literature indicating tactics to be used against the police.

8. On or about and between April 23rd, 1967 and May 28th, 1967, partly in the County of Queens and partly elsewhere, the defendants issued literature advocating the overthrow of organized government called "The Struggle for Black State Power in the U. S."

9. On or about May 5th, 1967, the defendants acting in concert, obtained and possessed in the County of Queens, an indeterminate amount of pipes and gun powder for making explosives.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF QUUENS, by this indictment, accuse the defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MILTON ELLIS, a/k/a Clarence Milton Ellis, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MANDOLA MC PHERSON, GEORGE SAMUELS, ABRAHAM C. TAYLOR, RAYMOND SMITH, FRED FERNANDEZ, AL HAYNES, a/k/a Edward Albert Haynes and MAX STANFORD, a/k/a Maxwell Curtis Stanford of the crime of CONSPIRACY TO COMMIT THE CRIME OF ARSON IN THE THIRD DEGREE, committed as follows:

The defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MILTON ELLIS, a/k/a Clarence Milton Ellis, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MANDOLA MC PHERSON, GEORGE SAMUELS, ABRAHAM C. TAYLOR, RAYMOND SMITH, FRED FERNANDEZ, AL HAYNES, a/k/a Edward Albert Haynes and MAX STANFORD, a/k/a Maxwell Curtis Stanford, acting in concert and being aided and abetted by accomplices known and unknown to the Grand Jury, on or about and between October 1st, 1965 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, knowingly, wilfully, corruptly and unlawfully conspired, confederated and agreed with each other and with persons known and unknown to the Grand Jury, to commit the crime of Arson in the Third Degree.

And in furtherance of said conspiracy, and in order to effect the objects thereof, the following overt acts, among

others, were done and performed by certain of the parties to said unlawful conspiracy, that is to say:

OVERT ACTS

1. On or about April 26th, 1967, the defendants HERMAN BENJAMIN FERGUSON and ARTHUR HARRIS, went to the vicinity of Sutphin Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a lumber yard.
2. On or about April 29th, 1967, the defendant ARTHUR HARRIS, went to the vicinity of New York Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a tire company.
3. On or about May 5th, 1967, the defendants acting in concert, in the County of Queens, obtained and stored cans of gasoline and oil.
4. On or about May 5th, 1967, the defendants acting in concert, in the County of Queens, obtained and stored an indeterminate amount of pipes and gun powder.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant HERMAN BENJAMIN FERGUSON of the crime of POSSESSION OF DANGEROUS WEAPON AS A FELONY, committed as follows:

The defendant HERMAN BENJAMIN FERGUSON, on or about March 27th, 1967, in the County of Queens, did unlawfully possess a dangerous weapon, to wit, a pistol, and at the same time had in his possession a quantity of ammunition which may be used discharge such pistol, and said possession did not take place in defendant's home or his place of business.

SEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant HERMAN BENJAMIN FERGUSON of the crime of POSSESSION OF DANGEROUS WEAPON AS A MISDEMEANOR, committed as follows:

The defendant HERMAN BENJAMIN FERGUSON, on or about and between October 1st, 1965 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, unlawfully possessed dangerous weapons with intent to use the same unlawfully against another, to wit, five rifles.

EIGHTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant MILTON ELLIS, a/k/a Clarence Milton Ellis, of the crime of POSSESSION OF DANGEROUS WEAPON AS A MISDEMEANOR, committed as follows:

The defendant MILTON ELLIS, a/k/a Clarence Milton Ellis, on or about March 27th, 1967, in the County of Queens, unlawfully possessed a dangerous weapon, to wit, a pistol.

NINTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant MILTON ELLIS, a/k/a Clarence Milton Ellis, of the crime of POSSESSION OF DANGEROUS WEAPONS AS A MISDEMEANOR, committed as follows:

The defendant MILTON ELLIS, a/k/a Clarence Milton Ellis, on or about March 27th, 1967, in the County of Queens, unlawfully possessed dangerous weapons with intent to use the same unlawfully against another, to wit, a shotgun and two rifles.

TENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant ARTHUR HARRIS, of the crime of POSSESSION OF DANGEROUS WEAPON AS A MISDEMEANOR, committed as follows:

The defendant ARTHUR HARRIS, on or about March 27th, 1967, in the County of Queens, unlawfully possessed a dangerous weapon, to wit, a pistol.

ELEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant ARTHUR HARRIS of the crime of POSSESSION OF DANGEROUS WEAPONS AS A MISDEMEANOR, committed as follows:

The defendant ARTHUR HARRIS, on or about and between October 1st, 1966 and June 19th, 1967, in the County of Queens, unlawfully possessed dangerous weapons with intent to use the same unlawfully against another, to wit, four rifles.

TWELFTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant MERLE STEWART of the crime of POSSESSION OF DANGEROUS WEAPONS AS A MISDEMEANOR, committed as follows:

The defendant MERLE STEWART, on or about and between July 1st, 1966 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, unlawfully possessed dangerous weapons, to wit, two pistols.

THIRTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant MERLE STEW-

ART of the crime of POSSESSION OF DANGEROUS WEAPONS AS A MISDEMEANOR, committed as follows:

The defendant MERLE STEWART, on or about and between July 1st, 1966 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, unlawfully possessed dangerous weapons with intent to use the same unlawfully against another, to wit, two rifles.

FOURTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant HAMPTON WOODWARD ROOKARD of the crime of POSSESSION OF DANGEROUS WEAPONS AS A MISDEMEANOR, committed as follows:

The defendant HAMPTON WOODWARD ROOKARD, on or about and between August 23rd, 1966 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, unlawfully possessed dangerous weapons, to wit, two pistols.

FIFTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant HAMPTON WOODWARD ROOKARD of the crime of POSSESSION OF DANGEROUS WEAPONS AS A MISDEMEANOR, committed as follows:

The defendant HAMPTON WOODWARD ROOKARD, on or about and between June 1st, 1966 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, unlawfully possessed dangerous weapons with intent to use the same unlawfully against another, to wit, three rifles.

SIXTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant MANDOLA MC PHERSON of the crime of POSSESSION OF A DANGEROUS WEAPON AS A MISDEMEANOR, committed as follows:

The defendant MANDOLA MC PHERSON, on or about and between November 18th, 1965 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, unlawfully possessed a dangerous weapon with intent to use the same unlawfully against another, to wit, a rifle.

SEVENTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant GEORGE SAMUELS of the crime of POSSESSION OF DANGEROUS WEAPON AS A MISDEMEANOR, committed as follows:

The defendant GEORGE SAMUELS, on or about and between August 23rd, 1966 and June 19th, 1967, partly in the County of Queens and partly elsewhere in places known and unknown to the Grand Jury, unlawfully possessed a dangerous weapon, to wit, a rifle.

DISTRICT ATTORNEY.

APPENDIX C

SELECTIONS FROM ORIGINAL RECORD ON APPEAL, DOCUMENT NUMBER 3, "ORDER TO SHOW CAUSE":

Being a Series of Clippings From Newspapers and Magazines Demonstrating the Misleading Publicity Issued by the District Attorney of Queens County Who Accused and Charged Appellant and His Co-Defendants With Advocating the Overthrow of the Government of the United States and Did Not Confine His Charge to the State of New York at or Around the Time of Appellant's Indictment in the Supreme Court of Queens County in June 1967

Headline: "Jail 16 Negroes In Plot To Kill Roy Wilkins" [New York Post, June 21, 1967, p. 1; B-1].*

Headline: "Nab 16 Negroes in Plot to Kill Wilkins

Story: "By VINCENT D. AUSTIN and WILLIAM H. RUDY

"Sixteen Negroes described as members of an anarchist black power group were rounded up in early-morning raids here today and charged with plotting to kill Roy Wilkins, NAACP executive director.

"The 12 men and four women were said to be members of the Revolutionary Action Movement, known as RAM, a group described in testimony before Congress as plotting to overthrow the government.

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* Italicized descriptions on left indicate the nature of the publication, i.e., headline or story; bracketed material indicates the publication source, page of court document indicated by "B-" followed by number of page.

"Seized with the 16, according to Queens District Attorney Mackell, were 30 weapons, including a machine gun and a number of carbines and 1,000 rounds of ammunition.

"Those arrested included the principal of a Queens public school, a Queens teacher, a Board of Education construction engineer, a Welfare Dept. clerk and a Transit Authority clerk.

"Two of the six suspects were charged with six overt acts in the plot, including calls to Wilkins' office to determine his movements, the planning of a getaway route from Wilkins' Queens residence and the purchase of weapons.

"The arrests were made in raids in Queens, Manhattan and Brooklyn by 100 police, many of whom had been working undercover for several months on the case.

"A large number of the detectives, including five women, were Negroes.

"Explosives and pamphlets—one reading: 'Move over—or I'll move you'—were confiscated.

"The DA's office said indictments named:

Herman B. Ferguson, 47, of 129-39 157th St., Jamaica, Queens, assistant principal of PS 42, Jamaica.

Merle Stewart, 47, of 111-29 179th Pl., St. Albans, Queens, a management analyst for the Navy.

Arthur Harris, 22, of 122-88 153rd St., Jamaica, no occupation.

Milton C. Ellis, 33, of 17-09 107th Ave., Queens, a mechanic.

Maxwell Stanford, 26, of 708 Eagle Av., The Bronx, no occupation.

Abraham C. Taylor, 60, of 97-06 Northern Blvd., Queens, an art gallery helper.

Raymond Smith, 33-22 106th St., Queens, no occupation.

Fred Fernandez, 23, of 94-17 32d Av., Queens, no occupation.

Hampton W. Rookard, 29, of 8 Stanhope St., Brooklyn, a construction engineer for the Board of Education.

Ursula V. West, 23, of 195 Willoughby St., Brooklyn, no occupation.

Harriet Noel, 26, of 1070 Anderson Av., The Bronx, no occupation.

Al Haynes, 43, of 6 Raleigh Av., Roosevelt, L. I., a mechanic.

George Samuels, 40, of 120-03 New York Blvd., a Transit Authority clerk.

Mariki Kaurouma, 24, of 25 W. 132d St., an exchange student.

Michele Kaurouma, 24, of 25 W. 132d St.

Mandola G. McPherson, 200-06 120th Av., Jamaica, a Welfare Dept. clerk.

"Mackell said the indictments were handed up yesterday by a Queens grand jury. They charge conspiracy to commit homicide, arson and anarchy.

"In Congressional testimony made public a month ago, FBI Director Hoover called RAM 'a highly-secret all-Negro, Marxist-Leninist, Chinese Communist-oriented organization which advocates guerrilla warfare to obtain its goals.'

"He said that Stokely Carmichael, a leading Black Power advocate, had connections with RAM, which was 'dedicated to the overthrow of the capitalist system in the U.S. by violence if necessary.' Carmichael has not commented on the charge."

• • •

Headline: "16 Arrested in Wilkins Death Plot" [Newsday, June 21, 1967, p. 7; B-3].

Story: "New York—Queens detectives arrested 12 men and four women in Queens, Brooklyn and Manhattan today and apparently foiled assassination attempts on Roy Wilkins, executive director of the National Association for the Advancement of Colored Peoples, and other civil rights leaders.

"A large number of rifles, revolvers, ammunition and various types of bombs were seized in the raids, Queens District Attorney Thomas Mackell said. The arrests followed an investigation of a radical Negro group calling itself 'RAM' for 'Revolutionary Action Movement,' Mackell said. He said RAM members made an abortive attempt to kill Wilkins last March and other moderate civil rights leaders also were marked for assassination by the group. He gave no details of the plot.

"The pre-dawn raids by detectives armed with search warrants followed an indictment handed up Tuesday by a Queens grand jury, accusing the 16 persons of arson, anarchy and homicide. Mackell said the arrested RAM members are followers of Chinese Premier Mao Tse-tung and are associated with another Negro organization called 'Black Americans Unite or Perish,' headed by Robert Williams. He said Wilkins, a resident of Kew Gardens in Queens, has been under police protection since the attempt on his life.

"Mackell said police learned through a telephone call from an informant on March 8 that a carload of heavily-armed RAM members was en route to Wilkins' home to assassinate him. The district attorney said Wilkins was not at home at the time and the car escaped a police search."

• • •

Headline: "THE MURDER TIMETABLE Say Negro Leaders Were To Die This Weekend" [New York Post, June 22, 1967, p. 1; B-4].

Headline: "Death Plot: Timetable Bared"

Story: By RALPH BLUMENFELD and KENNETH GROSS

"A 'timetable' said to have been designed by 16 accused Negro terrorists for the murder of Roy Wilkins and other moderate civil rights leaders was to have been set in motion this weekend, the New York Post was told today.

"The first in a series of assassinations—with Wilkins or Whitney Young, Jr. as the target—would have been attempted by trained snipers in the early morning tomorrow or Sunday, a high police source said.

"The accused plotters, arrested yesterday and held in a total of $207,500 bail for a hearing tomorrow before Queens Supreme Court Justice Livoti, are purported to have picked this week end to launch their plot.

"Their intent was to spur Negro militancy across the nation, police said, following recent ghetto rioting in Atlanta, Tampa, Dayton, Cincinnati and Watts.

"Chief Inspector Garelik and Queens District Attorney Mackell, while satisfied that the alleged plot has been headed off, emphasized that their investigations are continuing.

" 'By no means have we cleaned up the whole movement,' said Mackell. 'There might be some surprises.' "

• • •

Headline: "RIGHTS MURDER PLOT JAILS 16 Targets: Wilkins and Young." [New York Daily News, June 22, 1967, p. 1; B-7].

Headline: "Nab 16 in Death Plot On Negro Moderates

Story: "By THOMAS PUGH, GERALD KESSLER and HENRY LEE

"A plot by Negro extremists to assassinate Roy Wilkins, Whitney Young Jr. and other moderates in the civil rights movements—as well as to strike terror by gasoline and gunpowder—has been frustrated with the arrest of 16 persons, four of them city employes, authorities asserted yesterday."

• • •

Headline: "High Bail Holds 16 In Murder Plot"
[Long Island Press, June 22, 1967, p. 1; B-17].

. . .

Story: "Harris and Ferguson are charged with conspiracy to commit murder in the first degree, criminal anarchy, conspiracy to advocate criminal anarchy, conspiracy to commit arson, and violation of the weapons law.

"Thirteen others also appeared before Justice Livoti.

"Held in $20,000 bail were Merle Stewart, 46, of 111-29 179th Place, St. Albans, management analyst officer, the United States Medical Supply Center, Brooklyn; George Samuels, 40, of Manhattan, owner of a grocery store at 120-03 New York Blvd., Jamaica, the reported headquarters of RAM; Fred Fernandez, 23, of 94-17 32nd Ave., Corona, Manpower Development Board group leader, and Raymond Smith of 33-22 106th St., Corona."

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"Fernandez and Smith, who both have previous convictions, are charged with criminal anarchy, conspiracy to advocate criminal anarchy, conspiracy to commit arson and violations of the weapons law."

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"RAM's declared aim, authorities said, was a revolution that would seize power in the United States and throughout the world by violence and assassination.

"The indictments said that RAM 'teaches, advocates, advises and plans by writing and word of mouth the murder of various members of the Negro race whom it considers to be in opposition to its own policies.'"

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"In discussing the defendants, Mackell said that Fernandez, who headed a group of approximately 20 youths between the ages of 16 and 21, may well have tried to influence them with the RAM philosophy.

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"HE REFUSED comment when asked if Fernandez had recruited any of his charges into RAM. Mackell did point out, however, that most of the defendants came from middle-income brackets."

• • •

"Mackell said the members of the group had banded together in the Jamaica Rifle and Pistol Club to be used as cover and a front to obtain weapons.

"He said they practice their marksmanship at arsenals in Queens, Brooklyn and Nassau.

"He explained that the RAM members underwent classes in karate and mayhem."

• • •

Picture: Picture of Publications, Including "Peking Review" and "Black Power"
[Long Island Press, June 22, 1967, p. 2; B-21].

Caption: "Literature found during the raid allegedly reflects the philosophy of the organization . . . pro

Maoist. The rifle stock was also picked up in the raid."

• • •

Headline: "16 Negroes Seized; Plot to Kill Wilkins And Young Charged"
[New York Times, June 22, 1967, p. 1; B-23].

• • •

Headline: "16 NEGROES HELD IN TERRORIST PLOT"
[New York Times, June 22, 1967, p. 25; B-23].

• • •

Story: "At a news conference in the Queens prosecutor's office, Mr. Mackell and Chief Inspector Sanford Garelik of the Police Department said that other unnamed civil rights leaders, both Negroes and white, and Government officials also had been chosen as future targets of violence by the RAM members.

Mr. Garelik said that the group had been under surveillance for two years by police undercover agents. Mr. Mackell said that planned assassinations of Mr. Wilkins and Mr. Young were to have taken place this year.

The two officials said that the defendants planned to commit arson at gasoline stations, a subway station and a lumber yard."

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"Those arraigned, in addition to Mr. Ferguson and Mr. Harris, were the following

• • •

Fred Fernandez, 23, a former group leader for the Manpower Development Board, a Federal antipoverty project, of 94-17 32d Avenue, Corona.

• • •

Headline: "Charge Negro Plot to Kill Wilkins" [Newsday, June 22, 1967, p. 5; B-24].

Story: "By Jerry Parker:

"Kew Gardens—The Negro extremist organization RAM was accused yesterday of plotting to carry out a number of acts of violence, including the murder of Negro moderate leaders Roy Wilkins and Whitney Young, Jr.

"Police arrested 12 men and four women, including a schoolteacher and an assistant principal, all said to be members of the Revolutionary Action Movement," . . .

• • •

"Queens District Attorney Thomas J. Mackell, said that the 16, arrested on varying charges, were members of RAM, an anarchist group which federal authorities say is pro-Communist China and pro-Cuba. Mackell said that the group had a list of other targets in addition to Wilkins and Young, and that it also had plans to bomb and burn a subway station, a lumber yard, a tire store and gasoline stations."

• • •

"The others, as identified by police, were: . . . Fred Fernandez, 23, of 94-17 32d Ave., Queens; . . . "

"Mackell linked the movement to recent race riots in other U.S. cities. 'There has been a pattern of arson, in Tampa and other cities where there's been trouble,' he said. A map that pinpoints arson targets in the New York area has been seen by undercover men at meetings of the movement, Mackell said. . . . "

• • •

Headline: "3 NAMES ADDED AS PLOT TARGETS"
[New York Times, June 23, 1967, p. 16; B-27].

Headline: "Mackell Says Negro Group Planned Other Killings"

Story: "By McCANDLISH PHILLIPS

"The names of three more persons said to have been marked for assassination by an alleged ring of middle-class Negro revolutionaries were turned over the Federal Bureau of Investigation yesterday by Queens District Attorney Thomas J. Mackell.

"The action was taken, Mr. Mackell's office said, after the White House had called the F.B.I. office in New York to inquire about the other names reportedly on the revolutionary group's selective assassination list."

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"Twelve men and four women, said to be members of the group, were arrested Wednesday in pre-dawn raids carried out by 150 policemen."

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Headline: "White House, FBI Ask Mackell for Details on RAM"
[Long Island Press, June 23, 1967, p. 1; B-28].

Story: "By HAL SHAPIRO"

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"'The first time it was the White House,' Mackell said. 'A presidential aide wanted to know the names of the intended victims in the murder plot by RAM (Revolutionary Action Movement).

"'The second call came from FBI headquarters . . . and they, too, were anxious to know about the activities of RAM.'"

• • •

"HE DESCRIBED the 16 arrested Wednesday on charges including conspiracy to commit murder, criminal anarchy, conspiracy to commit arson and violation of the weapons law, as members of a group which preached the overthrow of our government and the assassination of executives.

"'They are unlike the Minutemen who wanted only to destroy those they termed as "bad" guys. They were opposed to evil influences outside of government, while RAM advocates the violent overthrow of the existing government.'"

• • •

"'THE POLICE Investigation into this matter dates back two years,'" Mackell declared. 'I have had Asst. DA Thomas Demakos of Jackson Heights on the case ever since we were informed about it.

"'He and Lt. James Murphy of my squad have been working together on it. Demakos had to do a tremendous amount of reading and had to digest hundreds of thousands of words before we felt we were ready to proceed.

"'We decided about a week ago to present our information to the regular June grand jury. And, on Tuesday there was the presentation. The grand jury was in session from 9:30 a.m. until 9:30 p.m. before handing up the indictment against 16 people—12 men and four women.'"

• • •

Headline: "Plea for Bail Cut Lost By 10 at RAM Hearing"
[New York Post, June 23, 1967, p. 5; B-31].

Story: "By VINCENT D. AUSTIN and LEONARD KATZ

"In a courtroom packed sympathizers, Queens Supreme Court Justice Livoti today refused to re-

duce bail for 10 of 16 Negroes accused of conspiring to murder certain moderate civil rights leaders."

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"Police, meanwhile, said they had compiled a 'death list' of five persons allegedly marked for assassination by the suspects who have been described as members of the pro-Peking Revolutionary Action Movement."

• • •

"The alleged death list has been turned over to the FBI, reportedly at the request of the White House. Police would not divulge the three names added to the list which originally identified NAACP executive director Roy Wilkins and National Urban League director Whitney M. Young, Jr. as marked for death."

• • •

Headline: "U.S. Eyes Rights Murder Plot"
[Daily News, June 23, 1967, p. 5; B-32].

Story: "By GERALD KESSLER and HENRY LEE

"Federal authorities at the highest level—the White House—intervened yesterday in the alleged murder-and-terrorist plot disclosed Wednesday with the arrest of 16 suspected Negro extremists, five of them city employes."

• • •

"... Queens District Attorney Thomas Mackell did divulge that the suspects had 'preached the overthrow of the government and the assassination of the top executives. The names of Lindsay, Rockefeller and Johnson were bandied about.'

"In February, Chief of Detectives Frederick Lussen briefed Mackell on the Revolutionary Action Movement, to which the 16 defendants reportedly belong.

"The group has been described as a secret Negro terrorist outfit, possibly directed by Robert Williams, with guidance from Communist China."

• • •

Headline: "14 ARE ARRAIGNED IN MURDER PLOT" [New York Times, June 24, 1967, p. 17; B-36].

Headline: "Pretrial Public Statements Deplored by Defense"

Story: "By THOMAS A. JOHNSON

"Fourteen of the 17 Negroes who were indicted Tuesday on charges ranging from plotting to murder moderate Negro civil rights leaders to advocating anarchy were arraigned in Queens County Criminal Court yesterday."

• • •

Headline: "Asst. Principal, Others Arrested; Members of RAM"
[New York Amsterdam News, June 24, 1967, p. 1; B-38].

Story: "By LES MATTHEWS, MALCOLM NASH

"A Queens assistant school principal and a man who identified himself as an African exchange student were among 16 persons, including four women, who were arrested by New York and Philadelphia authorities late Tuesday night in connection with a black extremist group's plot to murder Roy Wilkins, executive secretary of the NAACP, and Whitney M. Young, Jr., executive secretary of the National Urban League."

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Headline: "RAM ANARCHY PLOT HEARING July 19" [New York Amsterdam News, July 1, 1967, p. 1; B-40].

Story: "By LES MATTHEWS"

• • •

"The District Attorney contends that the RAM is Peking-oriented and that the organization organized the Jamaica Rifle and Pistol Club which met in George Small's grocery store at 120-03 New York Blvd., Jamaica, as a front.

• • •

"The Queens District Attorney's Office and the FBI contends that the RAMs received its orders from Robert Williams, formerly of the Union County, N. C. NAACP who is now living in Cuba or China."

• • •

Headline: "Who's Who in Alleged Plot"

• • •

"FRED FERNANDEZ, 27, 94-17 32nd Ave., Corona. He is employed as a Manpower Development Board group leader for boys between 16 and 21."

• • •

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 28 1969

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~813~~ ~~26~~ 9

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT FERNANDEZ

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New York, N.Y. 10036
Attorney for Appellant

INDEX

SUBJECT INDEX

	Page
I. Violation of First Amendment Provisions Are Patent in Specific Allegations of Indictment Against Appellant Framed Under Plainly Unconstitutional Statutes	1
II. Although Appellant Seeks Declarative Relief Only, Injunctive Relief Against the State Proceeding Is in Order Under Judicial Interpretation of 42 U.S.C. §1983 and Is Consistent With American Law Institute Policy	9
III. The Minimum Monetary Requirement, Plus the Subjective Standards for Qualification of Grand Jurors, Are Plainly Discriminatory and Unconstitutional	12
IV. Although the Patent Unconstitutionality of the Statutes Call for Them to Be Declared Unconstitutional and Invalid—If Findings of Fact Are Relevant, a Hearing Is in Order to Determine Those Facts	14
Conclusion	15
Erratum	17

CITATIONS

CASES:

Carter v. *Jury Commission of Greene County, Alabama*, 37 L.W. 3322 (No. 908, March 5, 1969)	13
Dombrowski v. *Pfister*, 380 U.S. 479 (1965)	10
Douglas v. *City of Jeanette*, 319 U.S. 157 (1943)	10
Gregory et al. v. *City of Chicago*, —— U.S. ——, March 10, 1969, 37 L.W. 4213	8-9
Murdock v. *Commonwealth of Pennsylvania*, 319 U.S. 105 (1943)	10

Page

People v. *Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829 (1967) cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976 ..... 2, 6, 8, 9, 11

People v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924 (1968) 12

Shuttlesworth v. *City of Birmingham*, —— U.S. ——, March 10, 1969, 37 L.W. 4203 8

United States v. *Robel*, 389 U.S. 258 (1967) 8

Yates v. *United States*, 354 U.S. 298 (1957) 6

Zwicker v. *Boll*, 270 F. Supp. 131 (W.D. Wisconsin 1968) affd. 391 U.S. 353 (1968) 11

STATUTES:

United States Constitution
First Amendment 1, 7, 8
United States Code
18 U.S.C. §2385 (The Smith Act) 6
28 U.S.C. §2283 ..... 9, 10
42 U.S.C. §1983 9
New York Judiciary Law (former)
Section 596 (3) 15
Section 661 15
New York Judiciary Law
Section 596 (6) 12, 15
Section 609 ..... 13, 15
New York Penal Law (former)
Section 160 et seq. 2, 15
Section 163 6
New York Penal Law
Section 240.15 9

MISCELLANEOUS:

American Law Institute Tentative Draft
No. 5 11
No. 6 ..... 10, 11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 813

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT FERNANDEZ

I.

Violation of First Amendment Provisions Are Patent in Specific Allegations of Indictment Against Appellant Framed Under Plainly Unconstitutional Statutes.

Appellants, argue the appellees, were not indicted for any crimes involving the dissemination of ideas under the New York anarchy statutes, but rather for their "hard core" conduct aimed at the overthrow of the state and

local government of New York [MB 7, 32, 38; LB 12].* The thrust of this argument is two-fold:

1. Because appellants are "hard core" criminals they have no standing to attack the unconstitutionality of the anarchy statutes.

2. Even though the language of P.L. §160 et seq. (anarchy) is vague, the specificity of the indictment as to the anarchy charges plus recent state court interpretation [*Epton*] confirm the validity of the indictment and the statutes under which it was brought and gave fair warning to appellants [LB 10; MB 8, 38].

It is true that the omnibus indictment containing 48 counts charges the appellants with arson and weapons crimes—the constitutional validity of which are unchallenged in this proceeding. Appellant Fernandez and his co-appellants do, however, assert the unconstitutionality of the anarchy statutes, which portion of the indictment cannot be constitutionally embellished by reliance on "hard core", common law crimes.

Reference to the indictment itself underscores the vagueness of the charge. The first count of the indictment charges that Fernandez and the other defendants

> "did wilfully, knowingly and intentionally advocate by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of

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* References to pages in the briefs of District Attorney Mackell appear by "MB" followed by a number; to the brief of the Attorney General by "LB" followed by a number.

rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said state and its various political subdivisions and agencies, including peace officers thereof and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished."

The second count of the indictment charges that Fernandez and the other defendants

"did wilfully, knowingly and intentionally print, publish, edit, issue, circulate, distribute and display certain papers and documents entitled, 'Total Resistance', 'Community Self Defense', 'The Struggle for Black State Power in the U.S.' and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished."

The third count charges that Fernandez and the other defendants

"did wilfully, knowingly and intentionally organize and help to organize and become a member of and volun-

tarily assemble with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished."

The fourth count—a conspiracy count—charged that Fernandez and the other defendants

"did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to advocate criminal anarchy, by the following means, among others: by advocating by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, includ-

ing peace officers thereof, and by assassination of said executive officials, and by other unlawful means; by printing, publishing, editing, issuing, circulating, distributing and displaying certain papers and documents entitled, 'Total Resistance', 'Community Self Defense', 'The Struggle for Black State Power in the U.S.' and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means; and by organizing and helping to organize and becoming a member of and voluntarily assembling with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; all with the further intent that said acts be presently attempted and accomplished."

Thereafter under the fourth count nineteen overt acts are alleged to support the conspiracy charge. Fourteen of the nineteen overt acts involve meetings and discussions among the defendants and/or the dissemination of literature. Only six of the overt acts include the defendant Fernandez. The above four counts are the only charges of anarchy lodged against Fernandez.*

It is to be noted again and again that all the anarchy charges have to do with discussion of ideas, advocacy of doctrine, assemblages, and dissemination of certain specific leaflets and pamphlets. No language in the indictment suggests the clear and present danger of this discussion or advocacy resulting in harm to the state or to the locality.** There is further no allegation in the indictment that the defendants were exhorting to "immediate action" nor was there any assertion that they constituted a group of sufficient size and cohesiveness as to justify the apprehension that action would occur. The *Smith Act* has been read by this Court to impose those requirements. *Yates* v. *United States*, 354 U.S. 298, 321 (1957).

Of more compelling weight, however, is the argument that the District Attorney seeks by this prosecution bottomed on anarchy, to proscribe defendant's conduct in the area of speech, writing and assemblage, traditionally

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* Counts six and seven charge other defendants Samuels and Stewart with violation of P.L. §163 (permitting premises to be used for assemblages of anarchists).

** As pointed out in co-appellants Samuel's brief p. 12 the *Epton* [*People* v. *Epton*, 19 N.Y. 2d 496, 227 N.E.2d 829 (1967) cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976] court seemed to find it sufficient that the clear and present danger be "that . . . riot . . . would be intensified or . . . rekindled", not that the government—state or local—be overthrown.

protected by the First Amendment. The District Attorney further seeks to strengthen, or perhaps validate, the other charges—of arson, and weapons possession—by the argument that defendant's unlawful intent did not involve the "usual purpose of robbery or assault" [MB 8, 32, 33]. Appellee charges that the purpose was the "overthrow of 'the government of the State of New York and its various political subdivisions and agencies'" [*ibid.*].

The record reveals that the defendants were first indicted for attempting to overthrow "the government" clearly implying the government of the United States.* Nor did there appear to be a real change of position in the superseding indictment which, although apparently confining itself to state and local government relied on a document entitled "The Struggle for Black State Power in the U.S." to support its anarchy charges [Appendix 19, 21, 22].

In an attempt to further prejudice the Court against the appellants herein appellee District Attorney in his brief in opposition indulges in testimonial narrative unsupported by record references as to his knowledge of defendant's activities [MB 31]. Again, as in his misleading press releases [See Appellant Fernandez Brief, pp. 65-78] relied on by appellant to show the unfairness of the within prosecution, the appellee District Attorney refers to a conspiracy to murder charge and trial against and conviction of two of the defendants (Ferguson and Harris) which charges are totally unrelated to the indictments in the instant action [MB 4, 9, 31].

By the technique of depicting the defendants-appellants herein as bad men not worthy of the court's consideration

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* Appellant Fernandez Brief, pp. 56, 58, 67, 68, 71, 73, 75.

and against whose activities there should be a proscriptive law, the respondents seek to deprive appellants of standing to challenge overbreadth and vagueness of the anarchy statutes. This Court, however, has more generally followed the policy that

> "an accused . . . does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him."

This Court further views with disfavor attempts to stretch legislation to save it from constitutional infirmity in the First Amendment area, *United States* v. *Robel,* 389 U.S. 258, 265-268 (1967).

The court below, relying on *Epton,* and the appellees, similarly, give undue weight to the power of a court to interpret vague statutory language so that it passes as valid specific legislation. Appellant remains mystified as to how a new judicial interpretation on May 16, 1967 could relate back to the continuing crimes of anarchy charged against appellant and his co-defendant commencing October 1, 1965 and continuing to June 21, 1967.

This Court has had occasion recently to deplore and disapprove an equally "remarkable job of plastic surgery" performed on the face of legislation. *Shuttlesworth* v. *City of Birmingham,* —— U.S. —— (March 10, 1969), 37 L.W. 4203, 4205. Similarly, this Court is cognizant of the capacity of legislatures and requires them to draft specific legislation to proscribe specific evils. See *Gregory et al.* v. *City of Chicago,* —— U.S. ——, March 10, 1969, 37

L.W. 4213, 4214-4215 (concerning opinion of Mr. Justice Black).

In the case at bar the legislature had already made an attempt to limit the broad scope of the anarchy laws by its amended law effective September 1, 1967 [P.L. §240.15] which appellee District Attorney refers to as an incorporation of the old law "for the sake of clarity." Appellant views the new law as infirm constitutionally as the old, but that issue is not directly before this Court at this time.

The failure of the New York State courts to apply constitutional doctrine in *Epton* requires this Court to set the judicial record in order at this time as to the validity of the "Gitlow" statutes in the sixth decade of the twentieth century.

II.

Although Appellant Seeks Declarative Relief Only, Injunctive Relief Against the State Proceeding Is in Order Under Judicial Interpretation of 42 U.S.C. §1983 and Is Consistent With American Law Institute Policy.

Appellees argue that 28 U.S.C. §2283 is a bar to the present proceeding under well established principles of federalism for if 42 U.S.C. §1983 was any exception whatsoever, the exception would be swallowing the rule [MB 11, LB 2]. The interests of justice would seem to be served in the case at bar, however, by the remedy of declaratory relief on the issue of the constitutionality of the statutes involved.* To date this Court has not squarely met the issue of whether relief is available to challenge a

* See note Appellant Fernandez brief n. 34 p. 43.

claimed unconstitutional statute or proceeding in a criminal case. The logic of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), reasonably extends itself to cover the situation of the case at bar—nor is *Douglas* v. *City of Jeanette*, 319 U.S. 157, 165 (1943), cited by appellees [MB 15, 20 LB 4] a bar to relief here. In denying an injunction against the enforcement of statute held that very day to be unconstitutional in another case (*Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105 (1943)), this court there said:

> "There is no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision of this Court holding the challenged ordinance unconstitutional as applied to petitioners."

The American Law Institute has addressed itself to this issue in its Study of the Division of Jurisdiction between State and Federal Courts and in that connection has formulated Section 1372* to interpret 28 U.S.C. §2283 in the light of current judicial thinking and opinion. The new proposed rule would prohibit injunctions to stay proceedings in state courts with seven express exceptions. Exception (7), relevant here, would permit an injunction if otherwise warranted where

> "the injunction is to restrain a criminal prosecution that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or because the prose-

* P. 41 Tentative Draft No. 6, April 1968.

cution is so plainly discriminatory against one who has engaged in conduct privileged under the Constitution or laws of the United States as to amount to a denial of the equal protection of the laws".

A reporter's note [to tentative Draft 5 quoted in Judge Fairchild's concurring opinion in *Zwicker* v. *Boll*, 270 F. Supp. 131, 138 (W.D. Wisconsin 1968), affd. 391 U.S. 353 (1968)] stated:

"Exception (7) goes beyond present law to, permit an injunction in certain civil rights cases where the very existence of a state prosecution may have a chilling effect on others who wish to exercise rights guaranteed by the Constitution of the United States." •

The case at bar would clearly come within exception (7) on the grounds that

"the statute . . . that is the basis of the prosecution plainly cannot be constitutionally applied to the party seeking the injunction."

Appellant further contends that the history of the anarchy statutes, which reveals their invocation only once before in 45 years [*Epton*] by the State of New York, also reveals their discriminatory application. They are directed against him and his co-defendants as black citizens in the exercise of their civil rights.

• The commentary attached to Tentative Draft #6 tells us that in meetings on exception (7) the American Law Institute in 1967 voted 102 to 65 to approve in principle clause (7) as it stood . . . p. 231.

III.

The Minimum Monetary Requirement, Plus the Subjective Standards for Qualification of Grand Jurors, Are Plainly Discriminatory and Unconstitutional.

The Appellee Attorney General has failed to reply to appellant's challenge to the statutes providing for the selection of Grand Jurors in New York State. Appellee District Attorney treated appellant's challenge as restricted to the $250 property requirement, and ignored the subjective criteria written into the law and currently unrepealed by the legislature. These criteria require a prospective juror to "be intelligent; of sound mind and good character; well informed" (Judiciary Law §596(6)). Appellees further ignored appellant's challenge to Judiciary Law §609 in effect at the time the Grand Jury sat to return the superseding indictment in January 1968.* Section 609 is appropriately challenged, however, since at the time the Grand Jury returned its superseding indictment

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* By *erratum* on p. 17 *infra*, it is noted that appellant erroneously informed the Court that the superseding indictment was returned in September of 1967. In fact it was not returned until January 15, 1968. The erroneous September references appear on pp. 4, 7, 10, 14, and 35 of Appellant Fernandez' brief.

In this regard, appellant notes the emphasis placed by Appellee Mackell on the appearances of appellants in the state court over a period of time extending through 265 days for a total of 58 formal motions (MB 9, A12-17). What the Appellee neglects to mention is that Appellants attained a degree of success in these legal proceedings. The State Court struck down the first indictment on January 10, 1968 (*People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924). Thus this action in the federal court was not brought 265 days after the indictment on which appellant-defendant was charged and will have to go to trial (failing this proceeding), but was brought (on March 12, 1968) a little over a month after the superseding indictment was filed in January, 1968.

against Fernandez. §609 requiring the County Clerk to make a "special investigation" of persons qualified to serve as Grand Jurors and to make a list of the persons the "investigation shows are suitable to serve" was in effect.

Appellant urges that these sections are clearly in violation of his right as part of due process of law to a fair and impartial Grand Jury representing a cross-section of the community (see Appellant Fernandez' brief, pp. 35-40).

Appellant has further noted that this Court will hear argument in *Carter* v. *Jury Commission of Greene County, Alabama,* 37 L.W. 3322 (No. 908, Jurisdiction noted March 5, 1969) on the constitutionality of a statute which requires jurors to be "reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character, and sound judgment."

Accordingly, the issue is ripe for this Court to consider and decide that the system under law in New York for the selection of Grand Jurors is discriminatory, and therefore unconstitutional.

IV.

Although the Patent Unconstitutionality of the Statutes Call for Them to Be Declared Unconstitutional and Invalid —if Findings of Fact Are Relevant, a Hearing Is in Order to Determine Those Facts.

The court below decided the case on the constitutional issues on its merits in the absence of a hearing, despite the factual issues raised by the pleadings.

Appellee Attorney General states categorically that no bad faith need be shown where there are charges of "murder, arson and sabotage," and that this federal proceeding "needlessly" interrupts a state prosecution (LB 4, 5). Appellee District Attorney speaks of the finding by the court below of "good faith (MB 28)—on what factual basis, appellant is at a loss to know. Certainly the charges made in appellant's complaint—i.e., that he is a black Afro-American citizen participating in peaceful protest activities centered around freedom for all American citizens categorized as Negroes and Puerto Ricans—and that the Defendant Mackell has initiated a course of conduct calculated to deprive plaintiff-appellant and others of their constitutionally secured rights, privileges and immunities—should not be ignored (Appendix 12-13).

Appellant Fernandez further asserts in his complaint the conduct of Appellee District Attorney in prejudicially mixing the attempted murder prosecution of the two co-defendants (Harris and Ferguson) with the anarchy cases as to prejudice his (Fernandez') cause. This same course of conduct has been followed by appellee Mackell in the filing of his brief in this Court (MB 9, 31).

Yet no hearing as to any of these facts has been held.

It is submitted that all the statutes challenged in this proceeding are invalid on their face—and plainly so. Accordingly, the facts and a finding thereon, may be immaterial to a proper judgment for appellant in this case. Nonetheless, if any weight is to be attached to the counter assertions of appellees, a hearing should be held.

Conclusion

The judgment of the court below should be reversed and the court directed to declare former Penal Law §160 et seq. and former Judiciary Law §596 (3), 661 and present Judiciary Law §596 (6) and §609, unconstitutional.

Respectfully submitted,

Eleanor Jackson Piel
Attorney for Plaintiff-Appellant,
Fred Fernandez

Erratum

Erratum: In Appellant Fernandez Brief in this Court it erroneously appeared that the superseding indictment was returned in September of 1967. In fact, it was not returned until January 15, 1958, after Justice Irwin Shapiro dismissed the indictment on January 10, 1968 (*People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924). The erroneous September references appear on pp. 4, 7, 10, 14 and 35 of the Fernandez Brief.

The citation to *Harris* v. *Younger*, in Appellant Fernandez Brief in the Index and on p. 28 should read, 281 F. Supp. 507.

SUPPLEMENTAL

BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~26~~ 9

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT

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INDEX

	Page
Point I	1
Point II	18
Conclusion	19

CITATIONS

CASES:

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964)	13
Avery v. *Georgia*, 345 U.S. 559 (1953)	18
Bouie v. *City of Columbia*, 378 U.S. 347 (1963)	17
Brandenburg v. *Ohio*, —— U.S. ——, June 9, 1969, 37 L.W. 4525	2, 8, 9, 10
Brooks v. *Beto*, 366 F. 2d 1 (C.A. 5, 1966)	18
Dennis v. *United States*, 341 U.S. 494 (1951)	3, 5, 6
Epton v. *New York*, Petition for Certiorari, No. 502, Oct. Term, 1967	4
Garner v. *Louisiana*, 368 U.S. 157	10
Gitlow v. *New York*, 268 U.S. 652 (1925)	3, 12
Harris v. *Younger*, 281 F.S. 507 (C.A. 9, 1968)	9
Herndon v. *Lowry*, 301 U.S. 242 (1931)	4
Keyishian v. *University of New York*, 385 U.S. 589 (1967)	4, 5, 6, 7
Lanzetta v. *New Jersey*, 306 U.S. 451 (1938)	11
Murdock v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 115 (1943)	10
N.A.A.C.P. v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958)	10, 13, 17
Noto v. *United States*, 367 U.S. 290 (1961)	16

Page

Pennsylvania v. *Nelson*, 350 U.S. 497 (1955) ..3, 5, 7, 16
People v. *Epton*, 19 N.Y. 2d 496 (1967) cert. den. app. dism. 390 U.S. 29; reh. den. 390 U.S. 976 (1968) 2, 4, 6, 7, 8, 10, 11, 12, 15, 16, 17
People v. *Gitlow*, 195 A.D. 773, 187 N.Y.S. 783 (1921), 234 N.Y. 132 (1922) 3, 8

Scales v. *United States*, 367 U.S. 203 (1961) 6, 16
Shelton v. *Tucker*, 364 U.S. 479 (1960) 13
Shuttlesworth v. *City of Birmingham*, —— U.S. ——, (March 10, 1969) 37 L.W. 4203 ..... 11, 12

United States v. *Robel*, 389 U.S. 258 (1967) 13, 15
Uphaus v. *Wyman*, 360 U.S. 72 (1959) 3, 4

Whitney v. *California*, 274 U.S. 357 (1927) 9, 10
Whitus v. *Georgia*, 385 U.S. 545 (1967) 18
Winters v. *New York*, 333 U.S. 507 (1948) 10

Yates v. *United States*, 354 U.S. 298 (1957) 16

STATUTES:

United States Constitution:
First Amendment 10, 12, 13

United States Code:
18 U.S.C. §2385 [*The Smith Act*] 3, 7

New York Judiciary Law (former):
Section 596 19
Section 661 19

New York Judiciary Law:
Section 609 19

New York Penal Law (former):
Section 160 et seq. 2, 3, 4, 5, 6, 12, 16, 17, 18, 19

New York Penal Law:
Section 240.15 "Practice Commentary" McKinney's Consolidated Laws Annotated (1967) 5

Ohio Revised Code:
Section 2923.13 8

Page

MISCELLANEOUS:

Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties, Cornell University Press (1956) 14

"Judicial Rewriting of Overbroad Statutes Protecting the Freedom of Association from Scales to Robel," 57 Cal. L. R. 240 (1969) 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 20

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT

I.

Appellant Fred Fernandez offers this supplemental memorandum addressed to certain questions raised by the Court with counsel during argument previously heard in this case on April 1, 1969, and based upon new considerations which inevitably arise as the result of this Court's

decision on June 9, 1969, in *Brandenburg* v. *Ohio*, —— U. S. ——, 37 L. W. 4525.

A question asked by this Court, in several ways, was whether or not New York Penal Law §§160 et seq. are constitutional with the gloss put upon them by the New York Court of Appeals in *People* v. *Epton*, 19 N. Y. 2d 496 (1967).

An operational answer to this question obviously requires 1.) analysis of what the gloss of *Epton* read into §§160 et seq. and 2.) decision whether the legislation with that gloss meets present constitutional standards as to legislation in the realm of "sedition."

In addition, the ruling by the New York Court of Appeals in *Epton* raises a serious due-process question: whether a state court may develop a gloss upon a statute inconsistent with a rewriting of the same statute by the legislature of the state and at variance with this Court's last interpretation of the same statute.

Finally, the instant case raises the familiar *ex post facto* question in a new form: whether such a gloss read into a statute by a state court may be applied to acts that occurred prior to such reading.

A review of the circumstances surrounding the instant case will set the context for this attempt to answer these questions.

New York Penal Law §§160 et seq.[1] were passed by the legislature of the State of New York in 1902 shortly after

[1] The text of P. L. §160 and §161 is set forth in Appellant Fernandez' Brief, pp. 47, 48. Section 163 is set forth in Appellant Samuels' Brief, p. 37.

the assassination, in New York State, of President McKinley by a self-confessed anarchist. New York's anarchy laws were not effectively invoked, however, until many years after when on February 5, 1920, a New York jury found Benjamin Gitlow, a socialist, guilty of anarchy. That conviction was affirmed by the Appellate Division, 195 A. D. 773, 187 N. Y. S. 783 (1921), and by the Court of Appeals, *People* v. *Gitlow*, 234 N. Y. 132 (1922), and finally affirmed by this Court in 1925, *Gitlow* v. New York, 268 U. S. 652. This Court found §§160 et seq. constitutional. In so doing, this Court held that state law could make a crime of the mere advocacy of a proscribed doctrine, even in the absence—as is underlined by the celebrated dissent of Justices Holmes and Brandeis—of a clear and present danger of the evil the legislature sought to proscribe.

New York Penal Law §§160 et seq. again drew notice of this Court in *Dennis* v. *United States*, 341 U. S. 494 (1951), where it was dealt a glancing blow. On this occasion, however, the Court plainly indicated that it would agree with the Holmes-Brandeis dissent in *Gitlow* rather than the majority opinion; the *Dennis* decision leaves the distinct impression that *Gitlow* is no longer the law. Four years later, this Court struck another blow at *Gitlow*, and state criminal syndicalism laws in general, in *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1955); the Court there held that the Smith Act and its associated legislation had preempted the field and that state courts could not penalize persons specifically for committing sedition because federal law imposed sanctions on seditious activities.[2]

[2] It is not here contended that common-law-variety crimes could not be grist for the state legislative mill. See *Uphaus* v. *Wyman*,

In January, 1967, this Court struck still another blow at the New York anarchy statutes as written in 1902. In *Keyishian* v. *University of New York*, 385 U. S. 589, 599, this Court said that "the possible scope of 'seditious' utterances or acts has virtually no limit" as defined in §§160 and 161 of the New York Penal Law, and declared two sections of the Education Law which relied on those definitions to be unconstitutional.[3] The effect of the *Keyishian* ruling was a declaration by this Court that §§160 and 161 defined a crime in an unconstitutionally vague manner.

New York Penal Law §§160 et seq. does not appear in the record again until 1964. In that year the old sedition acts were exhumed to prosecute a Negro political leader for activities connected—by the associated charges of riot and conspiracy to riot—with the Harlem riot of July 18, 1964.[4]

It was only after the *Epton* indictment that the New York legislature—reminded of its anarchy laws and the opinions of this Court and engaged in an overall review

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360 U.S. 72 (1959). There is no challenge in the case at bar to the constitutionality of the weapons and arson statutes applied in forty-one counts of the indictment.

[3] Justices Clark, Harlan, Stewart and White dissenting. Mr. Justice Clark's dissent is 1.) to the posture of the case, i.e. administrative remedies had not been exhausted, 2.) to the right of a state to set rules for teachers and, 3.) to distinguishing the application of this doctrine from criminal cases, i.e. *Herndon* v. *Lowry*, 301 U.S. 242 (1931) p. 627.

[4] The charge of riot [Penal Law 2090] was dismissed by the trial court at the conclusion of the people's case for failure of evidence to support such charge; the charge of conspiracy to riot was submitted by the judge to the jury after the court—upon conclusion of the entire case—permitted amendment of the indictment to conform to proof. [*Epton* v. *New York*, Petition for Certiorari, No. 502, Oct. Term, 1967, pp. 7, 9.]

and recodification of the State Penal Code—repealed §§160-164 substituting in their place a new section, §240.15. The new legislature responded in particular to the *Nelson* decision and decided that New York could no longer constitutionally proscribe seditious activity against the federal government (see "Practice Commentary" in McKinney's Consolidated Laws Annotated, 1967).[5] The legislature retained, however, the advocacy-of-doctrine concept when it made the new felony the advocacy of "the overthrow of the existing form of the government of this State [New York] by violence." It further proscribed publication of such doctrine or distribution of any documents so concerned "with knowledge of its contents" or membership in any organization advocating such doctrine "with knowledge of its purpose."

The legislature did not heed this Court's warning in *Dennis* that clear and present danger of the fact of such overthrow must be imminent nor did it specify any necessary criminal intent. Along with the corpus of the new Penal Code, of which it was a part, this redefinition of the crime of New York anarchy was set by the legislature to take effect September 1, 1967.

Notwithstanding the New York legislature's effort to make its anarchy statutes conform with *Nelson* and ignoring equally the opinion of this Court in *Keyishian,* the Court of Appeals of New York affirmed the anarchy con-

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[5] The indictment against the appellant Fernandez recites in support of its "anarchy" charge against him the publishing and circulating of a document entitled "The Struggle for Black State Power in the U.S." [A. 19, 21, 22]—a charge which on its face would appear to involve the national government.

viction of Epton in May, 1967 (four months after *Keyishian*).[6]

New York went further. In *Epton,* the Court of Appeals candidly conceded that §§160 and 161 as interpreted in *Gitlow* are unconstitutional because of the failure of the statute to require "a showing of 'clear and present danger' before one's freedom of speech may be abridged. . . ."

The Court of Appeals flatly ignored the legislature's action in 1965 where, in reconsidering the anarchy statute, the legislature still failed to include in a revised version any consideration of "clear and present danger" or of intent or capacity to bring about the anticipated evil, or as to the advocacy part of the statute, of the proviso that the advocacy be knowing, *Scales* v. *United States,* 354 U. S. 298 (1957).[7]

Instead, the court read into the ancient 1902 statute language which it assumed was "in harmony with the United States Constitution and the Constitution of the State of New York."

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[6] The Court of Appeals said: "The advocacy of the overthrow of the government by force and violence must be accompanied by an intent to accomplish the overthrow," citing *Dennis* and *Keyishian,* p. 506. The failure to mention that this Court in *Keyishian* found §§160 and 161 unconstitutionally vague as a definition of sedition is significant.

[7] In *Scales,* this Court said:

> "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur."

> "Now that our criminal anarchy statute is again before us, we have the obligation of construing it in accordance with sound constitutional principles so as to preserve its constitutionality." (p. 505)

Accordingly, that court attempted to read into the statute what it believed this Court had said in a line of opinions since 1925.

In so doing it dismissed *Pennsylvania* v. *Nelson,* 350 U. S. 497. It distorted *Keyishian* (see *supra,* p. 6 (footnote 6)). It ignored the specific intervening acts of the legislature. It dismissed as inconsequential the argument that changing the stated meaning of a statute after the so-called criminal act is a denial of procedural due process to a defendant—replying that a "defendant can be charged 'with knowledge of the scope of subsequent interpretation' by this Court." (p. 506) This even though the subsequent interpretation did not involve the specific state statutes but instead a federal law, the Smith Act.

Finally the Court of Appeals held that the "clear and present danger" of evil need not be the evil defined by the legislature in the statute, i.e. overthrow of organized government by force and violence, but need only be "that the riots then rocking Harlem would be intensified or, if they subsided, rekindled."

Although requested, this Court did not reach the merits in *Epton* and the Court of Appeals decision remains the law in New York. *People* v. *Epton, supra,* cert. den. app. dism. 390 U. S. 29; reh. den. 390 U. S. 976 (1968).

Barely a month passed after the *Epton* opinion in the Court of Appeals when the District Attorney in Queens

charged the Appellant Fernandez and fifteen others with the crimes of anarchy and conspiracy to commit anarchy coupled in Fernandez' case with one additional charge, the misdemeanor charge of conspiracy to commit arson in the Third Degree.

The indictments in both *Epton* and in the case at bar involved Negroes and the charge that they subscribed to unpopular political views [sedition], coupled with charges of riot and conspiracy to riot [*Epton*], conspiracy to commit arson in the Third Degree [*Fernandez*] and weapons possession [*Samuels*]. Since *Gitlow,* prosecuted in New York in 1920, the anarchy statute has been exclusively invoked against Negroes. The thought crime, either alone or coupled with some action crime, is now being adapted by prosecutors in other communities against Negro defendants in the effort to suppress urban ferment and protest.

At the last session of this Court, argument was presented challenging the constitutionality of the Ohio Criminal Syndicalism statute enacted in 1919. The case, *Brandenburg* v. *State of Ohio,* —— U. S. —— (June 9, 1969), 37 L. W. 4525, was before this Court in a different posture from that of the case at bar.[8] It had come up on direct appeal after a conviction under the statute, the Ohio court having upheld the conviction without opinion. This Court there reversed the conviction stating:

> ". . . the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe

[8] The defendant there was convicted of two counts of sedition only (Ohio Revised Code 2923.13). There were no associated common law crimes joined with the sedition charges as in the case at bar.

> advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto* v. *United States* (367 U. S. 290, 297-298, 1961), 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action' (see also *Herndon* v. *Lowry,* 301 U. S. 242, 359-261, 1937; *Bond* v. *Floyd,* 385 U. S. 116, 134, 1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control." (pp. 4525, 4526)

In the course of its opinion, this Court further overruled *Whitney* v. *California,* 274 U. S. 357 (1927), involving a statute similar to the Ohio statute—and also similar to the *Gitlow-Epton-Samuels-Fernandez* statute—on the grounds that "*Whitney* has been thoroughly discredited by later decisions."

Nor can it be overlooked that argument in the within case is to be joined with that in *Harris* v. *Younger,* 281 F. S. 507, where a three-judge federal court has held the California criminal syndicalism law unconstitutional in a proceeding under §1983, as in the instant case, prior to *Brandenburg.*

The distinction between *Harris* and *Fernandez* is that in the former no state opinion has specifically upheld the

state's syndicalism legislation. The California courts refused to review the validity of the indictment under a writ of prohibition sought by Harris, which refusal represented a following by the California court of this Court's 1927 *Whitney* decision, upholding the constitutionality of the syndicalism law.

Predicated on the logic of the Court of Appeals of New York in the *Epton* ruling, subscribed to by the court below, the California court now may at will revive California's syndicalism law by reinterpreting it to meet what it deems to be appropriate standards of the day and then reapply the law to acts which took place prior to the new definition. Such procedure would follow the *Epton* logic and circumvent this Court's overruling of *Whitney* v. *California, supra,* in *Brandenburg.*

This Court has said that it is bound by a state's interpretation of its own statute and will not substitute its judgment for that of a state. *Garner* v. *Louisiana,* 368 U. S. 157, 169 (1961). But there appears to be a qualification to this delegation of interpretive power to the state judicial power particularly as to cases which touch upon rights traditionally under the protection of the First Amendment. *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, 115 (1943); *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 461 (1958).

Nor does this Court accept uncritically the gloss asserted for a questioned statute by the state's highest court. *Winters* v. *New York,* 333 U. S. 507, 518, 519 (1948). Moreover, there appear to be special and more strict rules where the statute to be interpreted is a criminal statute

rather than a civil one. See *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1938).[9]

If we compare the case at bar to *Shuttlesworth* v. *City of Birmingham*, —— U. S. —— (March 10, 1969) 37 L. W. 4203, a parallel argument emerges. In *Shuttlesworth*, a city ordinance, under which petitioner was convicted, granted certain powers to the licensing authority for parades. An intermediate appellate court in Alabama reversed the conviction on the grounds of the discriminatory misapplication of the statute. The Supreme Court of the

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[9] Language of the Court in *Lanzetta* as applied to a newly passed New Jersey statute is equally applicable to the case at bar which is concerned with an old statute recently attempted to be resuscitated in *Epton*. The argument is further made by respondent, that despite the generality of the statute, the precision of the indictment saves the prosecution (Resp. B. pp. 6, 7). Viz.

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. *United States* v. *Reese*, 92 U.S. 214, 221; *Czarra* v. *Board of Medical Supervisors*, 25 App. D.C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg* v. *California*, 283 U.S. 359, 368; *Lovell* v. *Griffen*, 303 U.S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. [Footnote omitted] The applicable rule is stated in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" (p. 453)

State affirmed the conviction "giving the language of §1159 [the ordinance] an extraordinarily narrow construction."

This Court held that "the ordinance *as it was written* . . . fell squarely within the ambit of the many decisions of this Court over the last thirty years holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional (Emphasis supplied)."

This Court, however, apparently accepted the "job of plastic surgery 'upon the face of the ordinance'" performed by Alabama's highest court, but it refused to apply that interpretation retroactively—examining as it did so "the surrounding relevant circumstances" and noting that "First Amendment rights [were] hanging in the balance."

The parallel to the case at bar is compelling. An added factor here is that we now know that the statutes involved, §§160 and 161, are unconstitutional as written and as such writing was interpreted by this Court in *Gitlow* in 1925.

Assuming, *arguendo*, that the *Epton* gloss has restored constitutional validity to §§160 et seq., we are faced in the instant case with a situation where all the specific overt acts of law violation charged in the indictment occurred prior to May 16, 1967—the day the New York Court of Appeals decided *Epton*. Parenthetically, we must also note a distinction from *Shuttlesworth* that, as to the New York anarchy statutes, the New York State legislature had gone back to work in 1965 and had amended the law and specifically had *not* changed the language to conform to the new yet-to-be-pronounced interpretation of *Epton*.

As set forth in appellant Fernandez' "Reply Brief" (pp. 2-6), the criminal charges against him concern themselves with the expression of ideas, orally and in writing, and with association and membership—territory embraced by the First Amendment where this Court has always expressed its concern. *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *United States* v. *Robel*, 389 U. S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

As repeatedly underlined in oral argument before this Court by counsel for the respondent District Attorney, the advocacy-of-doctrine statute (P. L. ¼160 et seq.) serves the function in these cases of supplying the element of criminal intent necessary to support the prosecution of petitioners under the other criminal statutes invoked against them. The indictment is divided into forty-eight counts. Counts Eight through Forty-eight are all weapons-possession counts. To provide the element of unlawful intent necessary to make such weapons-possession unlawful the District Attorney has added the unlawful-advocacy allegations of Counts One through Four (the anarchy counts).[10]

It has never been made clear by respondent District Attorney why a criminal action cannot be brought against these appellants on the weapons and arson charges under the state law without intermingling of the vague and overbroad charges of sedition. An answer suggests itself:

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[10] Appellant Fernandez has not been indicted for illegal weapons possession. He has, however, been indicted for conspiracy to commit arson in the Third Degree. Presumably the anarchy counts against him (Counts One through Four) will supply the illegal intent to round out the arson charge. Certainly they will supply the prejudice before the jury.

appellants can be convicted for their "bad tendencies," as has happened to Americans in the past,[11] and need not be charged with the commission of crime.

In "Judicial Rewriting of Overbroad Statutes Protecting the Freedom of Association from Scales to Robel," 57 Cal. L. R. 240, 256-257 (1969), the author has stated:

> "It is usually assumed that to construe a statute narrowly in order to avoid constitutional questions is a mark of judicial self-restraint. By rewriting an overly broad statute a court may take the view that it is only subjecting the statute to a constitutional construction which the legislature must have intended. Furthermore, to declare the statute void for overbreadth would stigmatize the legislature for passing unconstitutional legislation.
>
> "The judicial self-restraint argument is based upon the fallacious assumption that judicial rewriting does not usurp legislative powers. This argument is not

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[11] The trial of Thomas Cooper under the Sedition Acts has been described:

> "Cooper, then, was prosecuted because his criticism tended to lead to insurrection against the government. The causation, according to Rawle [the prosecutor], was indirect, but real. Having leaped from words to insurrection, Rawle found little difficulty in taking the short step from the 'bad tendency' of Cooper's words to his 'bad intent' in writing the words. Although Cooper denied any 'bad intent,' Rawle could not help suspecting him of the motives he disclaimed; he presumed that Cooper's 'conduct must have arisen from the basest motives.' Since the words tended to undermine public confidence in the president, the intent must have been bad, and it was the duty of the jury to show that this kind of attack on the government was not to be made with impunity." James Morton Smith, *Freedoms Fetters: The Alien and Sedition Laws and American Civil Liberties,* Cornell University Press (1956), p. 320.

well grounded. [Footnote omitted] When a court engages in the process of rewriting statutes it is telling the legislature that the statute should have been written in a particular way, even though the legislature may have had no such intention. A more conservative approach, and more in keeping with the theory of separation of powers would be to declare the statute invalid and permit the legislature to decide whether and in what form the statute should be rewritten and reenacted. [Footnote omitted] This seems to be the attitude adopted by the Court in *Robel* (*United States* v. *Robel*, 389 U. S. 258):

> 'The Government has told us that Congress, in passing §5(a)(1)(D), made a considered judgment that one possible alternative to that statute—an industrial security program—would be inadequate and ineffective to protect against sabotage in defense facilities. It is not our function to examine the validity of that congressional judgment. . . . We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. [Footnote omitted]'"

Certainly the reasoning in *Epton* of the Court of Appeals and the court below was a variance with the *Robel* logic.

The foregoing recital provides the answers to the questions posed at the outset.

In the first place, it is clear that Penal Law §§160 et seq. as interpreted by the New York Court of Appeals and the court below in *Epton* are *not* constitutional under present standards of this Court.

In their *Epton* rulings the courts below added new elements to the bare language of the statute: 1.) intent to accomplish the overthrow of the government, and 2.) "clear and present danger" that the advocated overthrow may be attempted or accomplished.

In its invocation of "clear and present danger" of overthrow of the government, however, the Court of Appeals applied that language to *Epton* to mean only that the danger be "that the riots then rocking Harlem would be intensified or, if they subsided, rekindled" (*supra*, pp. 7-8). Thus, the court read out the necessity of "overthrow of the government" and the danger that such overthrow be "accomplished" as required by language in *Yates* v. *United States*, 354 U. S. 298 (1957); *Scales* v. *United States*, 367 U. S. 203 (1961); and *Noto* v. *United States*, 367 U. S. 290 (1961). It would appear that the statute as refurbished by *Epton* merely requires advocacy plus intention and that the advocacy and intention need only involve illegal action —not specifically overthrow of the government; nor does this new reading require as a necessary element the showing of danger that such overthrow may be accomplished.

In addition, the *Epton* court discounted the *Nelson* argument that the Smith Act and related federal legislation had preempted the field so that an indictment in 1964 or 1967 charging overthrow of the federal government under §§160 et seq. would be legal and constitutional.

Having answered the first question as to the present constitutionality of §§160 et seq. (as of 1967) in the negative, let it be assumed, *arguendo,* that this Court would hold otherwise—and would be impressed by the newly developed rationale in *Epton.*

The problem remains that appellant Fernandez herein and his fellow appellants, on the first day of October, 1965, up to and possibly beyond May 16, 1967, could have had no knowledge of the new-found interpretation of the Court of Appeals.

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In re Gliver,* 333 U. S. 257, and cases there cited." *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948).

Also see *Bouie* v. *City of Columbia,* 378 U. S. 347, 354-55 (1963); *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 454-55 (1958).

Accordingly, based upon the arguments delineated above, i.e. the history of the legislation, the line of opinions of this Court and the particular posture of the appellant as to prior notice of the *Epton* court opinion, this Court should reverse the judgment of the court below and declare §§160 et seq. unconstitutional as applied to the facts herein.

II.

Appellant is concerned that the importance of the issues discussed *supra* as to the constitutionality of Penal Law §§160 et seq. and their application to appellant, might obscure his further challenge to the constitutionality of New York Judiciary Law §§596(6), 609 and 661 which appellant contends are unconstitutional on their face.

The application of these statutes which set up subjective criteria and a minimum monetary requirement round out the injustice inflicted upon him in the instant state prosecution. The technique provided by statute assures, not a cross-section of the community, or a group of peers to this young Afro-American interested in the civil rights of his contemporaries—but, rather, the kind of discrimination exercised in *Avery* v. *Georgia*, 345 U. S. 559 (1953). Cf. *Brooks* v. *Beto*, 366 F. 2d 1 (C. A. 5, 1966).

Cases such as *Avery, supra,* and *Whitus* v. *Georgia*, 385 U. S. 545 (1967), have been reversed because the procedure followed in the impanelling of the grand jury was found by this Court to have been discriminatory. The instant case involves a challenge to the language of the statute itself which, according to appellant, is necessarily and unconstitutionally discriminatory.

The court below refused to act on the appellant's challenge to the grand-jury law, invoking the principle of federal abstention but finding comfort in an affidavit of the county clerk submitted by respondents to the effect that "the property requirement had no significance in his selection of jurors"—and not allowing its comfort to be disturbed by a hearing on the facts [A. 68, 69].

Under all the circumstances it would seem that appellant will be unfairly deprived of due process of law if this Court does not move against this politically inspired and unfair prosecution.

Conclusion

The judgment of the court below should be reversed and the anarchy laws of New York State (P. L. §§160 et seq.) should be declared unconstitutional and unconstitutional as applied to appellant; this Court should further declare the New York Judiciary Law §§596(6), 609 and 661 unconstitutional on their face and as applied to appellant.

Respectfully submitted,

Eleanor Jackson Piel
Attorney for Appellant
Fred Fernandez

No. 9

Vide No. 7 for Brief of appellee Atty Gen of N.Y. (filed Mar 11, 1969)

Vide No. 7 for Brief of appellee Mackell. (filed Mar 11, 1969)

Vide No. 7 for Brief of Dist Attorney on reargument (filed Sept. 25, 1969

Vide No. 7 for Brief of Atty Gen of N.Y. on reargument. (filed Sept 11, 1969)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 29

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT OF APPELLANT FERNANDEZ

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INDEX

SUBJECT INDEX

Page

Summary of Argument 1

Argument:

Point I—Action by This Court in the Instant Case Is Not Restrained, as Appellee Argues, by Considerations of State Sovereignty. On the Contrary, This Court Has an Affirmative Duty to Intervene in This Case in Accord With the "New Federalism" Set Out in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution and the Legislation That Gives Them Force, in Particular 42 U.S.C. § 1983 5

Point II—Although Now Repealed, the *Gitlow* Statutes of the State of New York (Penal Law §§ 160 *et seq.*) Remain Before This Court in the Instant Case Despite Appellee's Attempt to Place This Case *Ex Post Facto* Under New York Penal Law § 240.15. For One Thing, the Offspring Is Infected With the Constitutional Defect of Its Original 11

Point III—Abstention in This Case Could Prevent Appropriate Review if the Trial and Sentence Procedure Followed That in *Epton* .. 12

Point IV—This Court Should Act in the Instant Case Because This Case Brings Before It Again a Ruling (in *Epton*) by the Highest Court of the State of New York That Settles the Law as to a State Statute in 180-Degree Conflict With This Court's Holdings as to Federal and State Legislation in the Realm of Advocacy of Proscribed Political Doctrine 15

Page

Point V—Present Standards of Appropriate Legislative Purpose Require Review of the Legislative Intent Behind the *Gitlow* Statutes 17

Point VI—No "Refinement" by Indictment Can Cure the Infirmity of Unconstitutional State Statutes, as the Appellee Argues in This Instant Case. On the Contrary, Prosecution Under Those Statutes Promises to Deprive the Defendant-Appellant of the Protections of Due Process in the Trial of Other Charges Against Him. The Hazard to the Defendant-Appellant Under This Heading Is Squarely Exampled Before This Court by Appellee's Invocation of "Evidence" Outside the Record Before This Court 20

Point VII—The Procedure Followed in the Impaneling of the Grand Jury Which Indicted Appellant Produced a Grand Jury So Unrepresentative of the Community as to Deprive Appellant of His Constitutional Rights: This Court Should Declare Such Procedures Unconstitutional or Send the Issue Back to the District Court for a Hearing and Findings of Fact 24

Conclusion 30

Citations

CASES:

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 12
Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 20

Cameron v. *Johnson*, 390 U.S. 611 (1968) 7
Carter v. *Greene Cty. Jury Comm.*, —— U.S. ——, 38 L.W. 4082, January 19, 1970 .....4, 24, 25, 28
City of Chicago v. *Atchison T. & S.F. R.R. Co.*, 357 U.S. 77 (1958) 13

Page

Communist Party v. *Control Board*, 367 U.S. 1 (1961) 23

Davis v. *Mann*, 377 U.S. 678 (1964) 12
De Jonge v. *Oregon*, 299 U.S. 353 (1939) 3
Dennis v. *United States*, 341 U.S. 494 (1951) ..15, 16, 18, 19, 21, 22
Douglas v. *City of Jeanette*, 319 U.S. 157 (1943) 7

Gitlow v. *New York*, 268 U.S. 652 (1925) 14, 16, 18, 21, 22, 23

Harman v. *Forssenius*, 380 U.S. 528 (1965) 12
Herndon v. *Lowry*, 301 U.S. 241 (1937) 3

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 23
Konigsberg v. *State Bar*, 366 U.S. 36 (1961) 23

Landry v. *Daley*, 288 F. Supp. 200 (D.C. N.D. Ill. 1968) 2, 8, 10

McNeese v. *Board of Education*, 373 U.S. 668 (1963) 13

People v. *Ferguson*, 55 Misc.2d 823, 286 N.Y.S.2d 924 7
People v. *Epton*, 19 N.Y.2d 496, 227 N.E.2d 829 (1967), cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976 .....2, 12, 13, 15, 16, 21
People v. *Steinhardt*, 47 Misc. 252, 93 N.Y.S. 1026 (1905) 22

Shelton v. *Tucker*, 364 U.S. 479 (1960) 23
Speiser v. *Randall*, 357 U.S. 513 (1958) 23

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 3
Turner v. *Fouche*, —— U.S. ——, 38 L.W. 4090, January 19, 1970 .....4, 24, 25, 26, 27, 28

Whitney v. *California*, 274 U.S. 357 (1927) 22, 23

Page

Yates v. *United States*, 354 U.S. 298 (1958) 19
Younger v. *Harris*, October Term 1969, No. 4 .... 20, 22

Zwickler v. *Koota*, 389 U.S. 241 (1967) 7, 12

STATUTES:

Constitution of the United States

Article VI (Supremacy Clause) 1, 8
First Amendment 2, 4, 19, 20
Thirteenth Amendment 5
Fourteenth Amendment 5
Fifteenth Amendment 5

United States Code

5 U.S.C. § 1181 *et seq.* August 2, 1939 c. 410, 53 Stat. 1147 [The Hatch Act] 18
18 U.S.C. § 594 *et seq.* July 19, 1940 c. 440, 54 Stat. 767 [The Hatch Act] 18
18 U.S.C. § 2385—[The Smith Act] 3, 16, 18, 19, 21
18 U.S.C. § 2386 Oct. 17, 1940 c. 897, 54 Stat. 1201 [The Voorhees Act] 18
28 U.S.C. § 2283 ..... 2, 6, 8
29 U.S.C. § 141 *et seq.* June 23, 1947 c. 120, 61 Stat. 136 [The Taft-Hartley Act] 18
42 U.S.C. § 1983 ..... 1, 2, 5, 6, 8, 26
50 U.S.C. §§ 781 *et seq.*, 811 *et seq.* September 23, 1950, c. 1024, 64 Stat. 987 [The McCarran Act] 18

California Penal Code

Section 938.1 (West's Annotated Codes) 22
Section 11401 (West's Annotated Codes) 22

New York Judiciary Law (former)

Section 596 30
Section 661 30

Page

New York Judiciary Law

Section 609 30

New York Penal Law (former)

Section 160 *et seq.* (*Gitlow-Epton* Statutes) 2, 3, 4, 11, 12, 13, 15, 17, 18, 30
Section 223 13
Section 580 13
Section 2090 13

New York Penal Law

Section 215.70 22
Section 240.15 ..... 11, 12, 13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 20

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT OF APPELLANT FERNANDEZ

Summary of Argument

I

This Court has an affirmative duty to exercise federal jurisdiction in this case which duty is consistent with the First, Thirteenth, Fourteenth and Fifteenth Amendments and with the purpose of 42 U.S.C. § 1983. Article VI of the Constitution (the Supremacy Clause) requires that

§ 1983 be considered an express legislative exception to 28 U.S.C. 2283. *Landry* v. *Daley*, 288 F. Supp. 200 (D.C. N.D. Ill. 1968). The legislation of the Reconstruction period implementing the Fourteenth Amendment was designed to alter the balance of power between state and federal power so that the full rights of citizenship be secured for all men. Section 2283 is not a jurisdictional statute—its demand is directed to the discretion of the federal court.

II

The repeal of New York's anarchy law statute (Penal Law §§ 160 *et seq.*) does not moot the issue of the constitutionality of the statutes actually invoked in the criminal prosecution of appellant. New York's new anarchy statute (Penal Law § 240.15) suffers from similar constitutional infirmities. The respondent District Attorney has taken inconsistent positions in this regard claiming that 1) the new statute (Penal Law § 240.15) is an effective successor to the old, for it incorporates all the relevant provisions of the repealed statutes and 2) the old statute (Penal Law §§ 160 *et seq.*) is dead and can have no future "chilling effect" on First Amendment rights of appellant or anyone else.

Just as the old, the new statute suffers from overbreadth and vagueness nor does its language spell out any requirement of "clear and present danger."

III

Ultimate review by this Court after conviction under the anarchy statutes could be barred procedurally as this Court found in *People* v. *Epton*, 19 N.Y.2d 496 (1967) when it apparently reluctantly denied certiorari and dismissed

the appeal because the conviction and sentence could be upheld on a valid state ground which this Court deemed unconnected with the anarchy conviction. The appellant herein also charged with the crime of conspiracy to commit arson in the third degree is situated similarly to Epton in that he could be convicted of anarchy and conspiracy to commit arson. If given a year concurrent sentence a valid conspiracy to commit arson conviction could deprive this Court of a review of the already state-court interpreted and reinterpreted *Gitlow* statutes.

IV

The prior unconstitutional interpretation of New York's anarchy statutes (Penal Law §§ 160 *et seq.*) by the highest court of New York State is indeed a matter for federal concern. This Court has repeatedly asserted its authority to examine state court interpretation of state statutes. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Herndon* v. *Lowry*, 301 U.S. 241 (1937); *De Jonge* v. *Oregon*, 299 U.S. 353 (1939); *Dennis* v. *United States*, 341 U.S. 494, 501 (1951).

V

The Smith Act as interpreted in *Dennis* is distinguished from the *Gitlow-Epton* statutes as legislative history of the federal and state legislation reveals.

When the New York anarchy law was originally passed in 1902 the legislative purpose was directed against the threat of anarchy as seen in 1902 which was a generalized xenophobia.

The Smith Act passed by Congress in 1940 was directed against "communist subversion." Smith Act considerations should not be read retroactively into the *Gitlow* statute.

VI

No "refinement" by indictment can cure the infirmity of a state statute, unconstitutional on the grounds of vagueness and for reasons involving First Amendment considerations. Respondents seek relief from this Court by reference to prejudicial facts improperly asserted *dehors* the record.

VII

This Court's holdings in *Carter* v. *Greene Cty. Jury Comm.* (January 19, 1970) and *Turner* v. *Fouche* (January 19, 1970) underline the challenge of appellant to the procedure followed in the impaneling of the Grand Jury which indicted him. The $250 property requirement qualification for all grand jurors is unconstitutional on its face. The denial of all relief including a hearing on the allegations of economic and racial discrimination requires reversal of the decision.

ARGUMENT

POINT I

Action by This Court in the Instant Case Is Not Restrained, as Appellee Argues, by Considerations of State Sovereignty. On the Contrary, This Court Has an Affirmative Duty to Intervene in This Case in Accord With the "New Federalism" Set Out in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution and the Legislation That Gives Them Force, in Particular 42 U.S.C. § 1983.

A threshold question dealt with extensively in both the brief of the Appellee District Attorney and the Appellee Attorney General of the State of New York is whether or not the exercise of federal jurisdiction is warranted and necessary in the case at bar.

Appellant Fernandez has maintained in each of his three briefs already filed in the Court and will deal with the issue further here, that the case at bar—concerned with such fundamental issues as sedition and Grand Jury due process—presents issues peculiarly appropriate for exercise by this Court of its duty and authority to apply the standards of the federal Constitution to the state legislation before it herein.

The Attorney General assures us in his brief that the pending state action provides full opportunity to test the constitutional claims urged here by appellants and that well-established principles of federalism require that such

claims be adjudicated in the state courts, subject, of course, to review by this Court at some future date [SLB 3].[1]

The District Attorney states categorically that both injunctive and declaratory relief involving a stay of the proceedings are prohibited by Act of Congress [SMB 11]. This argument is apparently bottomed on two counts: the first, equitable—appellants waited 265 days, says the District Attorney, after the commencement of the state criminal proceedings before bringing an action in the federal court. Having appeared in the state court to make motions and applications, his argument goes on, appellants are barred from coming into the federal court for relief.

The second argument is predicated on the provisions of Judiciary Code, 28 U.S.C. § 2283, the source of which is an Act of Congress of 1793. Appellee District Attorney states "[s]imple inspection" of the language of § 1983 makes clear that it cannot be an exception to § 2283 stating: "Such construction would obliterate the prohibition and for any conceivable practical purposes repeal § 2283 and moreover would have done so ninety-eight years ago" [SMB 25].

The argument that appellants have no standing because they waited for 265 days from the time of the initial indictment before filing in the federal court, is without merit. As Appellant Fernandez pointed out in a footnote, on page 12 of his Reply Brief, "Appellants attained a degree of success in these legal proceedings. The state court struck down the first indictment on January 10, 1968

[1] Reference to pages in the Supplemental briefs of District Attorney Mackell appear by SMB followed by a number; to the Supplemental brief of the Attorney General by SLB followed by a number.

(*People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S.2d 924). Thus this action in the federal court was not brought 265 days after the indictment on which appellant-defendant was charged and will have to go to trial (failing this proceeding), but was brought on March 12, 1968, a little over a month after the superseding indictment was filed in January 1968."

The issue of whether or not a federal court should or has the power to issue an injunction against a pending state criminal proceeding was specifically left open by this Court in *Cameron* v. *Johnson*, 390 U.S. 611 (1968). Appellant Fernandez has contended throughout these proceedings, however, that it is not necessary for this Court to reach the issue of whether or not an injunction is appropriate because a declaratory judgment declaring the statutes attacked unconstitutional on their face, he believes, would meet the exigencies of the situation and be sufficient. See *Douglas* v. *City of Jeanette*, 319 U.S. 157, 165 (1943).

Even as Appellant Fernandez poses the issue, however, the declaratory relief for which he asks still involves a question of the proper scope of federal intervention in state court proceedings. This Court took on the issue as to declaratory relief in *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967). In *Zwickler* this Court reviewed the history of the delicate balance between federal and state jurisdiction and referred to the affirmative duty of the federal court to "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."

Against Appellant Fernandez's claim that this case is one appropriate for federal intervention—see Appellant

Fernandez's Brief for the Appellant, pp. 40 to 43—Appellee District Attorney Mackell argues in the following way [SMB 29]:

> "There is a notion that the presence of circumstances that give rise to the invocation of equity jurisdiction—inadequacy of any remedy at law, probability of grave and irreparable injury, the chilling effect of prosecution under vague and overbroad statutes affecting First Amendment rights—somehow constitutes judge-made exceptions to the legislative prohibitions against stays of state court proceedings. This notion is without foundation in the 176-year judicial history of the Act of Congress. This erroneous notion is traceable in some respects to the failure of the Supreme Court to reach the question of a legislative prohibition and to deny equitable relief on the grounds that judicial requirements for equity jurisdiction had not been met."

A conclusive rebuttal to this argument by Appellee District Attorney is presented by District Judge Will in *Landry* v. *Daley*, 288 F. Supp. 200 (D.C. N.D. Ill. 1968). That decision explores the judicial and historical implications of the legislation at issue here and concludes that under proper circumstances § 1983 is an express exception to § 2283. The Supremacy Clause itself (Article VI of the Constitution) would so require it. That court said at page 221:

> "The legislation of the Reconstruction period was designed not only to secure the full rights of citizenship for all men, but also to alter the balance of power between state and federal authorities which had ex-

isted from the beginning of our federal system. The effect on the federal system of this legislation is evident from even a casual examination. For the first time, the national government was vested with the major responsibility of protecting every individual in the full enjoyment of his rights of person and property. The Fourteenth Amendment is explicit in this regard. It places clear prohibitions on the states and gives Congress the affirmative power to enforce them. The Thirteenth and Fifteenth Amendments contain similar grants to Congress. The Civil War Amendments, therefore, reflect a constitutional revolution in the nature of American federalism.

"This revolution, in turn, represents a historical judgment. It emphasizes the overwhelming concern of the Reconstruction Congresses for the protection of the newly-won rights of freedmen. By interposing the federal government between the states and their inhabitants, these Congresses sought to avoid the risk of nullification of these rights by the states. With the subsequent passage of the Act of 1871, Congress sought to implement this plan by expanding the federal judicial power. Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states, but also where necessary, the desire to place the national government between the state and its citizens.

"In contrast § 2283 and its predecessors date back to the Congress of 1793. Its purpose is primarily to allow state courts to proceed to the determination of issues involving state law which might otherwise be drawn to the federal courts. It represents, therefore, an expression of the concept of American federalism

that the national sovereign shall treat the states with a certain deference and respect in their sphere of operations; it expresses a Congressional policy aimed at preventing 'needless friction' between state and federal courts.

"Thus, when the anti-injunction statute and Civil Rights Act are viewed in their historical posture, their relationship becomes clearer. Section 1983, a product of a later Congress and an expression of an overwhelming Congressional concern for the protection of federal rights from deprivation by state action, would seem to have been intended to be an exception to the general limitation of § 2283.

"Moreover, § 2283 is not a jurisdictional statute. Despite its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. It is essentially a statutory adoption of the doctrine of comity and its demand is directed to the discretion of the federal court." (All footnotes omitted.) *Landry* v. *Daley, supra* p. 223.

POINT II

Although Now Repealed, the Gitlow Statutes of the State of New York (Penal Law §§ 160 et seq.) Remain Before This Court in the Instant Case Despite Appellee's Attempt to Place This Case Ex Post Facto Under New York Penal Law § 240.15. For One Thing, the Offspring Is Infected With the Constitutional Defect of Its Original.

District Attorney Mackell has changed his position in the current brief on reargument from that taken in his brief filed in the last session of this Court. On page 2 of the former brief he refers to the various sections defining anarchy in the New York Penal Law effective up until September 1, 1967—§§ 160 *et seq.* At the top of page 3 of that brief he states:

> "For the sake of clarity a single provision of the current Penal Law, § 240.15, incorporates all of the provisions of the repeated (*sic*) statutes."

In his current brief the District Attorney says at page 34:

> "The anarchy statute before this Court died on the date of its repeal, July 20, 1965, was entombed on the date that repeal took effect (September 1, 1967), and by no stretch of the imagination can—as appellants contend—have any 'inhibiting effect' on the exercise of free speech [that] will operate unhindered."

As pointed out on page 5 of Appellant Fernandez's Supplemental Brief after Argument and before Reargument, the new Penal Law § 240.15 contains the same vague and overbroad language as that in §§ 160 *et seq.;* this fatal

defect is not cured by language limiting advocacy of "the overthrow of the existing form of government" to the State of New York and by making the knowledge of the contents of such doctrine an essential element to the crime. None of these changes reach the claim of constitutional overbreadth and vagueness made by appellants, nor is there written in the new statute the essential requirement of "clear and present danger"—see *infra* p. 21. Accordingly, despite the repeal of §§ 160 *et seq.* by the Legislature, a citizen in New York today can be prosecuted for the non-crime of anarchy under New York Penal Law § 240.15 which shares with the old law the infirmities of overbreadth and vagueness in defining a crime based on speech.

POINT III

Abstention in This Case Could Prevent Appropriate Review if the Trial and Sentence Procedure Followed That in Epton.

This is not a case where abstention by a federal court is appropriate in order to permit state courts an opportunity to resolve an unclear question of state law. The issues presented here were squarely decided by the New York Court of Appeals in *People* v. *Epton*, 19 N.Y.2d 496, 227 N.E.2d 829 (1967), cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976. This Court has held repeatedly that abstention is improper where state law is settled or was not fairly subject through an interpretation which would render unnecessary or substantially modify the federal question, see *Zwickler* v. *Koota*, 389 U.S. 241, 249-251 (1967); *Harman* v. *Forssenius*, 380 U.S. 528, 534-535 (1965); *Davis* v. *Mann*, 377 U.S. 678, 690-691 (1964); *Baggett* v.

Bullitt, 377 U.S. 360, 375-379 (1964); *McNeese* v. *Board of Education*, 373 U.S. 668, 673, 674 (1963); *City of Chicago* v. *Atchison T. & S.F. R.R. Co.*, 357 U.S. 77 (1958).

Appellant Fernandez in his Supplemental Brief after Argument and before Reargument, p. 16, has pointed out specifically how the New York State Court of Appeals and the court below have failed to meet the standards of this Court, in their construing of §§ 160 *et seq.* in *Epton*. In view of the fact that *Epton* went unreviewed here there is now even more reason for this Court to rule on the *Gitlow-Epton* statutes before they or their offspring (Penal Law § 240.15) are invoked by state prosecutors again.

The posture of *Epton* when it reached this Court foreshadows the situation in the case at bar. It is to be noted here that Fernandez, as well as the other appellants, is charged with other violations of the New York Penal Code in the omnibus indictment against them.[2]

The history of the *Epton* case in this Court is pertinent to the case at bar and presents a persuasive argument for this Court to decide this case now. Epton, as Fernandez in the case at bar, was charged with an additional violation of New York Penal Law (conspiring to commit riot, New York Penal Law §§ 580, 2090) coupled to the charge of anarchy and conspiracy to advocate criminal anarchy. In concurring in a denial of certiorari and dismissal of the appeal Mr. Justice Stewart expressly noted that the riot conviction presented no substantial federal question. And, "since the three sentences (on the anarchy and the riot

[2] In fact, Fernandez has only one other charge against him, conspiring to commit arson in the third degree (New York Penal Law §§ 580, 223) [A 23].

charges) were ordered to run concurrently," he concluded, "... this case does not require the Court to consider either the criminal anarchy conviction or the associated conspiracy conviction." Mr. Justice Stewart went on to say that if the constitutionality of New York's criminal anarchy laws were properly before the Court he would vote "to reconsider the Court's decision in *Gitlow* v. *New York*[3] and decide whether the New York anarchy statutes either on their face or as applied in that case violate the First and Fourteenth Amendments."

With the authority of *Epton* unchallenged on the judicial records there is an open invitation to the state court to repeat the sentencing procedure in *Epton* as to Fernandez. If Fernandez were convicted of all the charges against him, and if the sentences were concurrent and limited in length to the misdemeanor charge, an improper conviction under the anarchy statutes could remain unchallenged in this Court. Under this set of circumstances there would seem to be a denial of the supremacy of federal constitutional guarantees not in accord with fundamental concepts of due process.

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[3] 268 U.S. 652 (1925).

POINT IV

This Court Should Act in the Instant Case Because This Case Brings Before It Again a Ruling (in Epton) by the Highest Court of the State of New York That Settles the Law as to a State Statute in 180-Degree Conflict With This Court's Holdings as to Federal and State Legislation in the Realm of Advocacy of Proscribed Political Doctrine.

The court below asserted categorically that the interpretation of the New York Court of Appeals of the *Gitlow* statute in *Epton* was "entirely a matter of state law and not one of federal concern" (A 64), despite the fact that the new interpretation represented a one-hundred-and-eighty-degree change in the Court of Appeals' former interpretation which interpretation had forty-four years ago been endorsed by this Court. This proposition is a premise recited in the brief of Appellee Attorney General (SLB footnote 11) and was echoed in the arguments before this Court last had on April 1, 1969.

This Court has guarded jealously its authority to examine state court interpretation of state statutes with particular reference to whether or not the interpretation is reasonable and constitutional. In *Dennis* v. *United States*, 341 U.S. 494 (1951) erroneously relied on by appellees as having approved of *Gitlow-Epton* statutes and their application in *Gitlow*, this Court made clear that a different kind of review with different considerations involved arises when this Court reviews legislation passed by Congress as distinguished from legislation passed by state legislatures. State legislation is interpreted more strictly than federal legislation and this Court has customarily weighted its in-

terpretations of federal legislation toward the upholding of constitutionality. Chief Justice Vinson in *Dennis* stated:

> "We are not here confronted with cases similar to *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Herndon* v. *Lowry*, 301 U.S. 242 (1937); and *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); where a state court had given a meaning to a state statute which was inconsistent with the federal Constitution" (pp. 501, 502).

At this point, Justice Vinson made clear that a different standard is invoked by this Court when it is reviewing federal statutes from the standards invoked in review of state court interpretations of state legislation.

> "This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate judgments of convictions" (p. 502).[4]

There is a curious reliance in the briefs of both appellees on the decision in *Dennis* when, in fact, the Court there in its various opinions drew a sharp distinction between *Gitlow* and *Dennis*. Even though this Court there conceded that the Smith Act[5] upheld in *Dennis* was patterned after the 1902 New York Anarchy Law, the Court placed great emphasis on the fact that Congress in passing the Smith

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[4] New York in *Epton* has already obtained its conviction under the unconstitutional anarchy statutes which this Court chose not to review.

[5] 18 U.S.C. §§ 2385, 2387; June 28, 1940, c. 439, 54 Stat. 670.

Act and associated legislation had very much in mind the then current political threat of communist subversion—not contemplated in any way by the New York legislature in 1902.

POINT V

Present Standards of Appropriate Legislative Purpose Require Review of the Legislative Intent Behind the Gitlow Statutes.

As pointed out in Appellant Fernandez's opening brief (pp. 19, 20) the Committee of the Senate of the New York legislature which drafted the law which was to become Sections 160-166, inclusive, of the Penal Law stated:

> " . . . that immigration of recent years (1902) had made the United States the abiding place of numbers of foreigners who, without understanding of our institutions, had brought with them views and prejudices formerly unknown in this country, and doctrines which, if put into effect, would subvert not merely our or any particular form of government, but organized government everywhere."

The purpose of the legislation was: "the prevention of the spreading of doctrines hostile to the safety of our government and of all governments, which inevitably tend to lead those who profess them to commit crimes or at least prepare them mentally for their commission . . . all will agree, . . . that anarchy, by which we mean the doctrine organized government, of whatever nature whether republican or monarchial, should be overthrown by force, is a criminal doctrine, the teaching and spreading of which should be prevented by penal legislation."

In contrast to the legislative purpose of the New York anarchy law, Mr. Justice Frankfurter, concurring in *Dennis* said of the Smith Act:

> "Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation and the seriousness of the congressional purpose is attested by the volumne of legislation passed to effectuate the same ends" (pp. 550, 551).

Thus the *Gitlow* statutes involved a generalized xenophobia, versus the carefully considered historical grounds of national policy of the cold war in *Dennis*.

By a footnote there Justice Frankfurter refers to a number of contemporary Congressional acts aimed at "communist subversion" i.e., the Hatch Act,[6] the Voorhees Act,[7] the Taft-Hartley Act,[8] the McCarran Act[9] (p. 551).

In that same *Dennis* opinion at p. 542, Justice Frankfurter stated: "Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow* v. *New York*."

No doubt there will always be dispute by legal scholars as to what gloss the *Dennis* case places on legislation in the field of sedition. It is clear, however, from an analysis of the various majority opinions that the *Dennis* case distin-

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[6] 5 U.S.C. §§ 1181 *et seq.*; Aug. 2, 1939, c. 410, 53 Stat. 1147, 18 U.S.C. §§ 594 *et seq.*; July 19, 1940, c. 640, 54 Stat. 767.

[7] 18 U.S.C. § 2386; Oct. 17, 1940, c. 897, 54 Stat. 1201.

[8] 29 U.S.C. §§ 141 *et seq.*; June 23, 1947, c. 120, 61 Stat. 136.

[9] 50 U.S.C. §§ 781 *et seq.*, §§ 811 *et seq.*; Sept. 23, 1950, c. 1024, 64 Stat. 987.

guishes between state interpretation of state legislation in the field of sedition and federal legislation suggesting that this Court will always be more critical of state legislation and state court interpretation of that legislation where considerations of the First Amendment are involved.

In this connection, in *Dennis* the Court in its various opinions took pains to distinguish between the legislation passed in 1902 by the New York legislature and the legislation passed by Congress in 1940. This Court found that it could read into the language of the Smith Act contemporary (1940) historical and political factors which motivated Congress in passing the legislation even though the Smith Act was patterned after the language of those anarchy statutes. Such considerations by no logic can be imported retrospectively to the 1902 New York legislature. To do so would make a travesty of the process of judicial legislative interpretation. Cf. *Yates* v. *United States*, 354 U.S. 298, 319 (1958).

POINT VI

No "Refinement" by Indictment Can Cure the Infirmity of Unconstitutional State Statutes, as the Appellee Argues in This Instant Case. On the Contrary, Prosecution Under Those Statutes Promises to Deprive the Defendant-Appellant of the Protections of Due Process in the Trial of Other Charges Against Him. The Hazard to the Defendant-Appellant Under This Heading Is Squarely Exampled Before This Court by Appellee's Invocation of "Evidence" Outside the Record Before This Court.

Both respondents argue that the instant case is distinguishable from *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), because in *Brandenburg* the indictment was written in the language of the statute and the present case involved a "refinement of the statute in the indictment" [SMB p. 39, SLB p. 11].

A similar argument is made in the supplemental briefs on reargument of appellee John Harris (*Younger* v. *Harris*, October Term 1969, No. 4, consolidated for argument with the instant cases). Appellee Harris would have this Court distinguish the instant case from his case on the ground that an indictment drawn more narrowly than the unconstitutional statute under which it is brought can confer constitutionality upon such statute.[10]

As pointed out in Appellant Fernandez's brief, the indictment against the Appellant Fernandez, although prolix and containing many prejudicial allegations, is not "re-

[10] Without conceding this proposition, for which a dubious validity might be found where an unconstitutional statute is overbroad, this appellant contends that this proposition cannot hold in the case of a vague statute which violates a defendant's First Amendment rights.

fined." Nor does this alleged "refinement" of the indictment involve any allegation of the necessary element of "clear and present danger" read out of the statute in *Gitlow*, added in *Dennis* to the Smith Act and reintroduced into the state statutes in *Epton*. Each of the anarchy counts against Appellant Fernandez allege illegal advocacy. In count one, such advocacy is by word of mouth and in writing; in count two, the advocacy is by printing, publishing and editing papers and documents, some referred to, others generally described as "printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the government of the State of New York . . . should be overthrown by force and violence." The third count charges the appellant with organizing and assembling with others in order "to teach and advocate the doctrine of the overthrow of the government of the State of New York by force and violence." The fourth count is a conspiracy count alleging the illegal advocacy by means of confederating and agreeing with others. Each of the counts has an allegation that the appellant intended the acts which he advocated to be attempted and accomplished. Despite, however, the allegations of intent there is nothing in the indictment which says that the appellant or the appellants with whom he is associated have the present ability to execute the deeds advocated, nor that there was any danger that they might be effected. So impressed with the evil of appellant's intentions and conduct was Appellee Mackell that he devotes four pages of his brief on reargument to a detailed description of weapons, "fuses," "techniques of sabotage," "female revolutionary kits" and other inflammatory descriptive terms which are otherwise absent in the record of this case on appeal, apparently in order to set

the stage—prejudicially, that is—for this Court to rule against appellants on general principles of opposition to "hard-core" crime [SMB 4-6]. The apparent legal justification for this enumeration is the so-called evidence before the grand jury which is not before this Court at this time.

By contrast and because California criminal procedure is different from that of New York, the *Harris* brief specifically discusses the evidence before the grand jury.[11] Appellants in the instant case may never know what evidence was presented to the grand jury and it is inappropriate here for the District Attorney to tell us or for this Court to speculate as to what evidence was before that grand jury.[12]

Appellant Fernandez is further disturbed by the inexplicit premise and the suggested expressed distinction between *Fernandez* and *Harris* (see *Harris* Supplemental Brief, p. 16); in a case involving a similar vague and overbroad statute—the California Criminal Syndicalism Act (California Penal Code § 11401), that a distinction can be made between the two cases because in one, the *Harris* case, only "pure" speech is involved and in the instant case it is "speech brigaded with arms." Time and again this Court has considered in parallel fashion the decisions in *Gitlow* and *Whitney*.[13] (See *Dennis*, 341 U.S. pp. 538, 541; *Commu-*

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[11] California Penal Code § 938.1, West's Annotated Codes, provides *inter alia* that a transcript of the Grand Jury proceedings be served upon a defendant after an indictment has been found.

[12] New York Penal Law § 215.70 makes it a misdemeanor for persons privy to Grand Jury information to make disclosure of that evidence. Cf. *People* v. *Steinhardt*, 47 Misc. 252, 93 N.Y.S. 1026 (1905).

[13] *Whitney* v. *California*, 274 U.S. 357 (1927). This Court expressly overruled *Whitney* in *Brandenburg* v. *Ohio*, *supra*.

nist Party v. *Control Board*, 367 U.S. 1 (Black dissent 147, 148 footnote) (1961); *Speiser* v. *Randall*, 357 U.S. 513, 537 (Douglas concurring), 542 (Clark dissenting) (1958); *Shelton* v. *Tucker*, 364 U.S. 479, 497 (Harlan dissenting) (1960); *Konigsberg* v. *State Bar*, 366 U.S. 36, 63 (Black dissenting) (1961). Thus the overruling of *Whitney* would seem to overrule *Gitlow*. More specifically, *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), implicitly overruled *Gitlow*. Parenthetically here, Appellant Fernandez could be an incidental casualty of this argument were it to assume any validity. In a 48-count indictment containing six anarchy counts and 37 weapons counts, Appellant Fernandez is not charged with a single weapons count. Nonetheless, weapons are referred to as part of the anarchy counts and then, as a bootstrap argument, Appellee Mackell tells us that the anarchy charges are necessary to his indictment because the "unlawful intent" for the possession of these weapons contained in 37 counts of the indictment is not predicated upon the *usual* purpose of robbery or assault. Rather, the purpose is the overthrow of the "government of the State of New York and its various political subdivisions and its agencies, by force and violence, to wit, the use of rifle shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished" [SMB 37].

The premise here is that the alleged illegality of appellants' intention with respect to arms or to arson will vali-

date and constitutionalize an otherwise vague, overbroad, moribund statute which by its own terms proscribes the advocacy of doctrine only. It would seem that the references to weapons and techniques of sabotage contained in the District Attorney's brief are calculated to have the same (but antithetically complementary) effect on this Court as the charges of anarchy will have upon a court and jury if a trial of this action in its present posture is permitted by this Court to take place.

POINT VII

The Procedure Followed in the Impaneling of the Grand Jury Which Indicted Appellant Produced a Grand Jury So Unrepresentative of the Community as to Deprive Appellant of His Constitutional Rights: This Court Should Declare Such Procedures Unconstitutional or Send the Issue Back to the District Court for a Hearing and Findings of Fact.

This Court has had occasion to consider the issues raised by appellant's challenge to the New York judiciary law in *Carter* v. *Greene Cty. Jury Comm.*, —— U.S. ——, 38 L.W. 4082, January 19, 1970 and *Turner* v. *Fouche*, —— U.S. ——, 38 L.W. 4090, January 19, 1970.

In *Carter* a group of Negro citizens brought a class action for declaratory relief, to enjoin the systematic exclusion of Negroes from Greene County juries and an order vacating the appointments of the jury commissioners.

A three-judge court convened below had conducted an extensive evidentiary hearing after which it found that the jury selection process in Greene County departed from the

statutory mandate and that "there is an invalid exclusion of Negroes on a racially discriminatory basis." Accordingly, the District Court ordered the Jury Commissioner "to take prompt action" to remedy the situation.

The District Court did not, however, enjoin the enforcement of the statutory provisions on their face or direct the appointment of Negroes to the jury commission. This Court said there however, "the federal courts are not incompetent to fashion detailed and stringent injunctive relief that will remedy any discriminatory application of the statutes at the hands of the officials empowered to administer it" [4087].

The challenge to the Alabama statute in *Carter* on its face is similar to the challenge in the case at bar with reference to the subjective criteria for the selection of grand jurors. This Court answering this challenge held that a state statute for jury selection may sanction such subjective standards declaring: "the states remain free to confine the selection to citizens, to persons meeting specified qualifications of age, educational attainment and to those possessing good intelligence, sound judgment and fair character" [4085, 4086].

Respondents, no doubt, will argue that the holding in *Carter* disposes of appellant's challenge to the judiciary statutes providing for the impaneling of grand jurors. Not so. In *Carter* the three-judge District Court at the request of the plaintiffs below held a hearing which resulted in a finding of the District Court that "there is an invalid exclusion of Negroes [from the jury] on a racially discriminatory basis," and directed the jury commissioners to take prompt action to compile a jury list " . . . in accordance

with the laws of Alabama and . . . constitutional principles" [4084].

The court below in the case at bar held no hearing on the claim made by appellant that in consequence of the subjective standards of selection applied by the County Clerk—the composition of the grand jury which indicted him was not composed of a cross-section of the community and so not a jury of his peers, economically or racially. (See Brief for Appellant, pp. 3, 49.)

Appellant also challenged the mandatory statutory requirement in effect at the time the grand jury which indicted him was selected of a $250.00 minimum property requirement.

In *Turner,* the thrust of the complaint brought under 42 U.S.C. § 1983 was that Negroes have no voice in school management because there were no Negroes on the School Board. A requirement for school board membership was the status of freeholder or property owner. The School Board was chosen by the grand jury which had been selected by the jury commissioner.

Again after an extensive hearing (denied in the case at bar) the court first found that Negroes were being systematically excluded from the grand jury—not offset by token inclusion—and accordingly Negroes had little chance for appointment to the School Board.

Thereafter a new grand jury was chosen numbering a greater percentage of Negroes. The court below held this grand jury to be not unconstitutional nor illegal. With the facts thus settled, the lower three-judge court held requirements of the numbers of the board to be freeholders to be not unconstitutional.

This Court held otherwise. It held that the affirmative attempt to increase the Negro representation on the grand jury did not meet the standards for "corrective action by a federal court charged with responsibility of enforcing constitutional guarantees."

Squarely congruent with the $250.00 property qualification for service on the New York Grand Jury in the case at bar was a freeholder requirement for membership on the School Board of Taliaferro County in *Turner*. As to that this Court said:

> "We may assume that the appellants have no right to be appointed to the Taliaferro County Board of Education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees" [4094].

This Court determined that such a requirement was an "invidious discrimination."

This Court also did not accept the testimony of officials that as to race discrimination, it was "never observed." Said this Court:

> "The testimony of the jury commissioner and Superior Court judge that they included or excluded no one because of race did not suffice to overcome appellant's prima facie case" [4093].

In the case at bar the court below denied appellant a hearing with regard to the challenge to the statute and the practice under that statute of selecting grand jurors. Of even less weight in the testimony of the jury commissioner and the Superior Court judge in *Turner* should have been the affidavit of the County Clerk of Queens County. Said the court below:

> "... a property requirement had no significance in the selection of jurors since [the County Clerk] had long proceeded on the theory, whether factually correct or not, that everyone possessed the minimal amount of property necessary" [A. p. 68].

The court below would have the appellant's only relief in the long appellate process of raising the prejudice of an improper grand jury at the point of conviction and appeal and possibly certiorari to this Court. The court below said:

> "However all this may be, we see no reason why plaintiff's contention as to grand jury selection cannot be effectively presented in the New York court and to the Supreme Court on review. ... Indeed, these questions go into the validity of this and any other indictment, being peculiarly a matter to be determined by the state courts in the first instance" [A. pp. 68, 69].

Appellant has little hope for relief along that route. See cases cited in Brief for Appellant, p. 39.

It is appellant's contention here just as in *Carter* and *Turner* that the language of the statute, together with the practice followed under it in New York, denied him a jury of his peers both economically and racially. In *Carter* this Court stated:

> "Once the state chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hue to several constitutional criteria in ensuring that the section of membership is free of racial bias . . . that kind of discrimination (racial) contravenes the very idea of a jury—'a body truly representative of the community,' composed of 'the peers or equals of the person whose right is selected or summoned to determine; that is of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds'" [4085].

If this Court does not find the $250.00 minimum property requirement for a grand juror discriminatory in and of itself, certainly appellant is entitled to a hearing on the entire issue of whether or not the grand jury which indicted him was properly and constitutionally constituted. He is further entitled to federal declaratory or injunctive relief now before he is subjected to a trial.

Conclusion

The judgment of the court below should be reversed and the anarchy laws in the State of New York (Penal Law §§ 160 *et seq.*) should be declared unconstitutional and unconstitutional as applied to appellant. This Court should further either declare the relevant sections of the New York Judiciary Law § 596, Subdivision 3, Subdivisions 609 and 661 unconstitutional or grant an evidentiary hearing to determine whether or not unconstitutional procedures were followed in the impaneling of the grand jury which resulted in an indictment of appellant.

Respectfully submitted,

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Dated: January 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 9

FRED FERNANDEZ,

Appellant,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

SUPPLEMENTAL BRIEF OF APPELLANT FERNANDEZ BEFORE THIRD ORAL ARGUMENT 1970-1971 TERM

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September, 1970

Washington, D. C. THIEL PRESS 202 393-0625

TABLE OF CITATIONS

Page

Cases:

Baggett v. Bullitt, 377 U.S. 360 (1964) 3

Benton v. Maryland, 395 U.S. 784 (1969) 6

Bouie v. City of Columbus, 378 U.S. 347 (1963) 6

Brandenberg v. Ohio, 395 U.S. 444 (1969) 6, 8

Cameron v. Johnson, 381 U.S. 741 (1965) 7

Cameron v. Johnson, 390 U.S. 611 (1968) 2

Chestnut v. New York, 26 N.Y. 2d 481 (1970) 8

Dombrowski v. Pfister, 380 U.S. 479 (1965) 3, 6, 7

Douglas v. City of Jeanette, 319 U.S. 157 (1943) 3

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 4

McNeese v. Board of Education, 373 U.S. 668 (1963) 3

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 3

New York Times v. Sullivan, 376 U.S. 254 (1964) 4

People v. Epton, 19 N.Y. 2d 496, 227 N.E. 2d 829 (1967), cert. den., app. dism. 390 U.S. 29 (1968), reh. den. 390 U.S. 976, appl. reh. den. 398 U.S. 944 (1970) 4, 5, 6, 7

People v. Ferguson, 55 Misc. 2d 24, 286 N.Y.S. 2d 924 (1968) 2

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) . . . 4

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) . . . 6

U.S. *ex rel* Chestnut v. New York, Docket No. 70 Div. 294 (S.D.N.Y.) 8

Whitney v. California, 274 U.S. 357 (1927) 8

Zwickler v. Koota, 389 U.S. 241 (1967) 3, 8

Statutes:

United States Constitution

First Amendment 2

United States Code

42 U.S.C. § 1983 3

28 U.S.C. § 2283 3

New York Judiciary Law

Section 596(3) 8

New York Penal Law (former)

Sections 160 *et seq.* (Gitlow-Epton Statutes) 2, 4, 5, 8

New York Penal Law

Section 240.15 5

Miscellaneous:

"Black Power Advocacy: Criminal Anarchy or Free Speech," 56 Cal. L. Rev. 702 (1968) 4

Maraist "Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski," 48 Texas L. Rev. 539 (1970) 3

Meiklejohn, Alexander, *Free Speech in its Relation to Self Government:* Harper & Row (1948) 4

"The Federal Anti-injunction Statute and Declaratory Judgments in Constitutional Litigation," 82 Harv. L. Rev. 1870 (1970) 3

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Because the issues raised by this appeal are of on-going concern to this Court, which has called for a third oral argument, Appellant Fernandez requests leave to file yet one more brief[1] in an attempt to persuade the Court to the justice of his cause and of the necessity for this Court's

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[1] Appellant has filed with this Court four briefs in the within case: Brief for the Appellant, Reply Brief for Appellant, Fernandez, Supplemental Brief after Argument and Before Reargument and Reply Brief after Argument and Before Reargument

intervention in his prosecution by the State of New York. That prosecution is predicated on unconstitutional state law and infected by the unfairness invariably associated with deprivation of First Amendment rights, which this Court has long condemned.

Appellant's four briefs already on file argue at length the unconstitutionality of the New York anarchy law, the *Gitlow* and now *Gitlow-Epton* statutes (Penal Law §§160 *et seq.*), and challenge, in addition, the constitutionality of the statutes providing for the grand jury which indicted appellant.

Before this Court can reach the issue of the claimed unconstitutionality of the state statutes, however, a threshold question of great importance must be answered. That question involves the delicate balance between state and federal jurisdictions. In this case a state criminal proceeding had already been initiated in the courts of New York State. The original indictments against appellant and his co-defendants were returned on June 22, 1967. These indictments were dismissed upon motion of the defendants below on January 10, 1968.[2] Appellant and others were reindicted by the same grand jury on January 15, 1968—on a time schedule which, as a practical matter, prevented appellant from moving in the federal court in the intervening five days (notice of Justice Shapiro's ruling was given counsel at the re-arraignment of appellant on January 18, 1968). In all events, this case squarely raises the issue of the propriety of a federal court's enjoining a state criminal proceeding which has already commenced—an issue expressly left open for decision by this Court in *Cameron v. Johnson*, 390 U.S. 611 (1968).

It will be appellant's contention to be urged *infra* that the facts of this case entitle appellant to injunctive relief. Injunctive relief looks, however, to the future and may have sweeping effect; such relief from the federal courts,

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[2]*People v. Ferguson*, 55 Misc. 2d 23, 286 N.Y.S. 2d 924.

therefore, raises in the state courts the hackles of state sovereignty in addition to raising the specific question of judicial interpretation of 28 U.S.C. §2283. Nonetheless, there is no contention at this time that the New York courts would not respect a declaratory judgment on the issue of the constitutionality of state statutes here challenged. *Douglas v. City of Jeanette*, 319 U.S. 157 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965); *Zwickler v. Koota*, 389 U.S. 241 (1967).

Appellant urges herein that considerations of abstention be set aside and that this Court declare the New York anarchy laws unconstitutional.

The lower federal courts are divided on the issue of whether or not 42 U.S.C. §1983 is an express exception to the anti-injunction statute 28 U.S.C. §2283. See Maraist "Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski," 48 Texas L. Rev. 535 (1970) and "The Federal Anti-injunction Statute and Declaratory Judgments in Constitutional Litigation," 82 Harv. L. Rev. 1870 (1970).

Appellant is aware that the relief he seeks here is not only "strong medicine" but that the delicate balance between state and federal jurisdictions should not lightly be disturbed either by injunctive or by declaratory interference in pending state litigation. This Court, however, has long held high the rights reserved to the citizen by the First Amendment and has championed the individual against the state where that conflict is squarely raised. *McNeese v. Board of Education*, 373 U.S. 668, 671, 672 (1963), *Baggett v. Bullitt*, 377 U.S. 360, 378, 379 (1964). Historically, the rights protected by the First Amendment assume their crucial importance most clearly in times, as now, of social and political crisis when the citizenry and the electorate need most urgently to hear the voices of unpopular minority dissent.

Appellant has proposed four criteria against which to view the actions of this Court and which compel action by this Court in declaring the New York *Gitlow-Epton* statutes unconstitutional for the same defects of vagueness and overbreath that this Court has already attached to these statutes in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

These criteria arise directly from the special circumstances of the case at bar; they involve the First Amendment considerations that make appropriate the extraordinary relief requested.

First: The anarchy charges in this case are predicated upon the petitioner's engagement in the public business—politics and government—in the sense spoken of by Alexander Meiklejohn[3] and discussed by this Court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), cf. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The counts charging appellant with anarchy and conspiracy to advocate criminal anarchy (counts 1, 2, 3, 4) concern themselves, exclusively, with his acts of speech, printing and association; they allege advocacy of "force and violence" on the basis of handbill expressions of personal outrage and political dissent, as set out in documents referred to in the indictment entitled "Total Resistance", "Community Self Defense", "The Struggle for Black State Power in the United States" [see Appendix pp. 17-23]. See in this connection "Black Power Advocacy: Criminal Anarchy or Free Speech," 56 Cal. L. Rev. 702 (1968).

Second: Any relief via the state route has been foreclosed in this case by *People v. Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829 (1967), cert. den., app. dism. 390 U.S. 29 (1968), reh. den. 390 U.S. 976 (1968), appl. reh. den. 398 U.S. 944 (1970). Federal abstention may indeed be in order where it might be anticipated that a state high court would make federal intervention unnecessary; that is not the situation here. With respect to the holding by the New

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[3] *Free Speech in its Relation to Self-Government:* Harper & Row (1948).

York State Court of Appeals in *Epton*, appellant contends that court did not succeed in its attempt to narrow the vague and overbroad provisions of Penal Law §§ 160 *et seq.* [See Supplemental Brief After Argument and Before Argument, pp. 2-12, Reply Brief After Argument and Before Reargument, pp. 11, 12.]

As to the holdings by the New York State Court of Appeals appellant now, in particular, challenges the proposition and concept that a state in the United States can appropriately make a crime of advocacy of the overthrow of a state government.[4] In 1788 when New York became a part of the Union it ceded essential aspects of its sovereignty. If the Capitol in Albany were stormed and a rebel flag raised above Governor Rockefeller's new state buildings, would this not constitute a threat to the nation provoking prompt federal remedy and action?

The New York Court of Appeals did not take on this issue in its attempt to give a new and constitutional gloss to the 1902 statutes; rather it specifically read into the statute the requirements of 1) intent to overthrow the state government and 2) "clear and present danger" that the overthrow may be attempted or accomplished. In applying the law thus newly refurbished law to Epton, however, it held sufficient under the anarchy charges that Epton's "exhortations (all speech) . . . created a 'clear and present danger' that the riots then rocking Harlem would be intensified or, if they subsided, rekindled." (19 N.Y. 2d 506)

The state court gave only lip reference to "clear and present danger;" it did not, from any analysis or citation of the facts of the case, find any imminentness of conduct that the state has a right to proscribe, as most recently dis-

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[4]When the legislature amended Penal Law §§ 160 *et seq.* in 1965 with Penal Law § 240.15, it tried to confine the "advocacy of overthrow" to the government of the State of New York; the official commentator said, perhaps with this consideration in mind, "concededly an offense of limited utility." [See "Practice Commentary", McKinney's Consolidated Laws (1967).]

cussed by this Court in *Brandenberg v. Ohio*, 395 U.S. 444, 449 (1969). It further dismissed, with cavalier disregard of the rights of the citizen, considerations of notice, equally applicable to Fernandez (indicted barely a month after the *Epton* ruling) as well as to Epton, as developed by this Court in *Bouie v. City of Columbus*, 378 U.S. 347 (1963) and more recently in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Appellant is thus foreclosed from any hope of relief from his state's highest court in this prosecution.

This second reason for granting relief was not available to appellants in *Dombrowski v. Pfister*, 380 U.S. 479, 499 (1965); it is clear here, as it was not there, that the "state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively."

Third: Because the charges against appellant associate conspiracy to commit arson in the third degree with anarchy and conspiracy to advocate anarchy, and because a conviction on the conspiracy-arson charge and the anarchy charges could bring a concurrent sentence as in *Epton* (Judge Burke in *Epton*, 19 N.Y. 2d 512, Justice Stewart 390 U.S. 29), review by this court on *certiorari* or appeal might well be barred or declined. While *Benton v. Maryland*, 395 U.S. 784 (1969) would seem to hold otherwise, this Court does not always decide to hear every issue involving claimed injustice.

It is here urged upon this Court, moreover, that the present prosecution is most certainly one brought under a state statute that attempts to legislate speech and association and so is one that commands the historic sovereign concern of the Federal courts. Considering the long wait under the very best of circumstances between the bringing of the prosecution[5] and the appellant's (rightful as well as hopeful)

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[5]As the record shows this appellant has been under indictment since June 1967. Certainly his own activities have been affected by this fact.

vindication, such prosecution cannot result otherwise than in the stifling of appellant's political activities. *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965). Moreover, when a trial in which a recognized state charge of criminal action (e.g.: conspiracy to commit arson in the third degree, as in this case, or conspiracy to commit riot, as in *Epton*) is compounded with unconstitutional anarchy charges, that trial is bound to produce a trial record polluted (as in *Epton*) with matter that would be excluded by the workings of due process (e.g.: evidence as to criminal intent predicted upon and borrowed from the defendant's expression of unpopular or extreme political views, as in *Epton*).[6] Long before this nation adopted its Bill of Rights, the Lord Chancellor Coke had concluded: "The Devil himself cannot try the soul of a man."

Fourth: Appellant alleges in his complaint the unfairness of the entire prosecution. In this connection he urges the bad faith of the prosecution underlined by press releases at or about the time of his indictment. See Brief for Appellant, Appendix C, p. 65. The court below ignored this claim and decided the case in the absence of any finding on the issue. *Dombrowski* developed such a claim as an appropriate issue for consideration by a federal court where an injunction is sought against state proceedings. At this juncture, this Court might, as to this claim, send the issue back to the District Court for a hearing. *Cameron v. Johnson*, 381 U.S. 741 (1965).

Appellant is loathe to suggest this result, though some finding of fact would seem to be in order for the invocation of the drastic equity action represented by an injunction. Considerations of fairness and the early rather than later determination of criminal cases would urge more conclusive action by this Court at this time.

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[6] In fact Appellee Mackell, the Queens District Attorney intends to borrow the intent from the anarchy statutes to fill out the element of illegality as to the other charges. See Brief for Appellee Mackell, pp. 5, 32. Brief on Reargument for Appellee District Attorney, pp. 10, 37.

Accordingly appellant urges that this Court issue a declaratory judgment, at last declaring the New York anarchy statutes unconstitutional and beyond the reach of judicial plastic surgery. *Brandenberg v. Ohio*, 395 U.S. 444, 449 (1969) has so made the Ohio criminal syndicalism law; *Whitney v. California*, 274 U.S. 357 (1927), upholding the California counterpart of the New York *Gitlow* statutes, has there been overruled. *Zwickler v. Koota*, 389 U.S. 241 (1967) invokes principles as to the appropriateness of a declaratory judgment peculiarily applicable to the case at bar. On the four grounds recited above, appellant here urges that *Zwickler* furnishes ample authority for this Court's intervention in the state action against him.

There remains one claim by appellant that the New York Judiciary Law sections providing for the impaneling of the state grand jury are unconstitutional and should be enjoined or declared invalid. Although it it apparent, that at least as to the $250 property requirement [Jud. Code §596(3)], that statute is unconstitutional on its face, the logic of appellant's foregoing argument would foreclose injunctive or declaratory relief on this issue—that argument being predicated upon the paramount nature of First Amendment rights. The New York Court of Appeals has ruled constitutional the statutes and the procedures followed pursuant to them in *Chestnut v. New York*, 26 N.Y. 2d 481 (1970). This Court may yet have an opportunity to rule on this issue *U.S. ex rel Chestnut v. New York*, Docket No. 70 Civ. 2942 (S.D.N.Y.). Appellant concedes that the issue is not ripe for determination here under the standards now urged on this Court, to declare the New York judiciary laws unconstitutional.[7]

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[7] Appellant nonetheless protests the apparent gratuitous finding by the court below of the validity of the statutory $250 property requirement merely because it was not enforced by the County Clerk —this in the absence of a factual hearing on the issue [Appendix, p. 68].

CONCLUSION

This Court should reverse the court below and declare the New York anarchy laws unconstitutional.

Respectfully submitted,

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September, 1970

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

NOS. 7 AND 9.—OCTOBER TERM, 1970

George Samuels et al., Appellants,
7 *v.*
Thomas J. Mackell, District Attorney, et al.

Fred Fernandez, Appellant,
9 *v.*
Thomas J. Mackell, District Attorney, et al.

On Appeals From the United States District Court for the Southern District of New York.

[February 23, 1971]

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellants in these two cases were all indicted in a New York state court on charges of criminal anarchy, in violation of §§ 160, 161, 163, and 580 (1) of the New York Penal Law.[1] They later filed these actions in federal district court,[2] alleging (1) that the anarchy statute was void for vagueness in violation of due process, and an abridgment of free speech, press, and assembly, in violation of the First and Fourteenth Amendments; (2) that the anarchy statute had been pre-empted by federal law; and (3) that the New York laws under which the grand jury had been drawn violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment because they disqualified from jury service

[1] These provisions were repealed effective September 1, 1967, and a new criminal anarchy statute, in somewhat different form, took effect on the same date.

[2] The complaint in No. 7 was filed in the Southern District of New York. The complaint in No. 9 was originally filed in the Eastern District, but was later transferred to the Southern District by consent.

any member of the community who did not own real or personal property of the value of at least $250, and because the laws furnished no definite standards for determining how jurors were to be selected. Appellants charged that trial of these indictments in state courts would harass them, and cause them to suffer irreparable damages, and they therefore prayed that the state courts should be enjoined from further proceedings. In the alternative appellants asked the District Court to enter a declaratory judgment to the effect that the challenged state laws were unconstitutional and void on the same grounds. The three-judge court, convened pursuant to 28 U. S. C. § 2284, held that the New York criminal anarchy law was constitutional as it had been construed by the New York courts and held that the complaint should therefore be dismissed. 288 F. Supp. 348 (D. C. S. D. N. Y. 1968).[3]

In No. 2, *Younger* v. *Harris*, we today decided on facts very similar to the facts in these cases that a United States District Court could not issue an injunction to stay proceedings pending in a state criminal court at the time the federal suit was begun. This was because it did not appear from the record that the plaintiffs would suffer immediate irreparable damages in accord with the rule set out in *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), and many other cases. Since in the present case there is likewise no sufficient showing in the record that the plaintiffs have suffered or would suffer irreparable damages, our decision in the *Younger* case is dispositive

[3] The court also said that even if its view on the merits was wrong, relief should be withheld because the statutes being challenged were no longer in effect. With respect to the plaintiffs' challenge to the selection of the grand jury, the District Court held, in reliance on *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), that this claim could be effectively presented to the New York courts and therefore did not call for federal intervention at this stage.

of the prayers for injunctions here. The plaintiffs in the present cases also included in their complaints an alternative prayer for a declaratory judgment, but for the reasons indicated below, we hold that this alternative prayer does not require a different result, and that under the circumstances of these cases, the plaintiffs were not entitled to federal relief, declaratory or injunctive. Accordingly we affirm the judgment of the District Court, although not for the reasons given in that court's opinion.

In our opinion in the *Younger* case, we set out in detail the historical and practical basis for the settled doctrine of equity that a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury. The question presented here is whether under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate. The question is not, however, a novel one. It was presented and fully considered by this Court in *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943). We find the reasoning of this Court in the *Great Lakes* case fully persuasive and think that its holding is controlling here.

In the *Great Lakes* case several employers had brought suit against a Louisiana state official, seeking a declaratory judgment that the State's unemployment compensation law, which required the employers to make contributions to a state compensation fund, was unconstitutional. The lower courts had dismissed the complaint on the ground that the challenged law was constitutional. This Court affirmed the dismissal, "but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits." *Id.*, at 301–302. The Court, in a unani-

mous opinion written by Mr. Chief Justice Stone, noted first that under long-settled principles of equity, the federal courts could not have enjoined the Louisiana official from collecting the state tax at issue there unless, as was not true in that case, there was no adequate remedy available in the courts of the State. This judicial doctrine had been approved by Congress in the then recent Tax Injunction Act of 1937, 50 Stat. 738, now 28 U. S. C. § 1341. Although the declaratory judgment sought by the plaintiffs was a statutory remedy rather than a traditional form of equitable relief, the Court made clear that a suit for declaratory judgment was nevertheless "essentially an equitable cause of action," and was "analogous to the equity jurisdiction in suits *quia timet* or for a decree quieting title." 319 U. S., at 300. In addition, the legislative history of the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, as amended, 28 U. S. C. § 2201, showed that Congress had explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of traditional equitable principles. Accordingly the Court held that in an action for a declaratory judgment, "the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds." 319 U. S., at 300. The Court's application of these principles to the specific problem of declaratory judgments relating to the collection of state taxes is worth quoting in full, because it bears so directly on the problem before us in the present case:

> "The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate

use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.

"It is true that the Act of Congress speaks only of suits 'to enjoin, suspend, or restrain the assessment, levy, or collection of any tax' imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." 319 U. S., at 299.

The continuing validity of the Court's holding in the *Great Lakes* case has been repeatedly recognized and reaffirmed by this Court. See, *e. g.*, *Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540, 545, n. 4 (1946); *Ott* v. *Mississippi Barge Line*, 336 U. S. 169, 175 (1949); *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 253 (1952) (DOUGLAS, J., dissenting); *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 189 (1959); *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, 8 (1962). Although we have found no case in this Court dealing with the application of this doctrine to cases in which the relief sought affects state criminal prosecutions rather than state tax collections, we can perceive no relevant difference between the two situations with respect to the limited question whether, in cases where the criminal

proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting "further necessary or proper relief," and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to "protect or effectuate" the declaratory judgment, 28 U. S. C. § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would. As we said in the *Wycoff* case, *supra*, 344 U. S., at 247:

> "Is the declaration contemplated here to be *res judicata*, so that the [state court] cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State [court] before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." See also *H. J. Heinz Co.* v. *Owens*, 189 F. 2d 505, 508–509 (C. A. 4th Cir. 1951).

We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an in-

junction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

We do not mean to suggest that a declaratory judgment should never be issued in cases of this type if it has been concluded that injunctive relief would be improper. There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief. Ordinarily, however, the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction.

For the reasons we have stated, we hold that the court below erred in proceeding to a consideration of the merits of the New York criminal anarchy law. Here, as in the *Great Lakes* case, the judgment dismissing the complaint was based on an adjudication that the statutes challenged here are constitutional and is thus in effect a declaratory judgment. We affirm the judgment dismissing the complaint, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of declaratory judgment should have been denied without consideration of the merits. We, of course, express no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun.

Affirmed.

For opinion of MR. JUSTICE STEWART concurring in these cases see No. 2.

SUPREME COURT OF THE UNITED STATES

Nos. 7 AND 9.—OCTOBER TERM, 1970

George Samuels et al., Appellants, v. Thomas J. Mackell, District Attorney, et al.	On Appeal from the United States District Court for the Southern District of New York.
Fred Fernandez, Appellant, v. Thomas J. Mackell, District Attorney, et al.	

[February 23, 1971]

MR. JUSTICE DOUGLAS, concurring.

The same New York statutes on anarchy that were sustained in *Gitlow* v. *New York*, 268 U. S. 652, are involved in these cases. It was in that case that Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, said in dissent:

> "It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at birth. The only difference between the expression of an opinion and in incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to

> be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

In *Gitlow* the only overt acts were advocacy of overthrow and publication of the writings that contained the advocacy. *Id.*, at 655. *Gitlow* and its progency, including *Whitney* v. *California*, 274 U. S. 357, went into the discard with our decision in *Brandenburg* v. *Ohio*, 395 U. S. 444. In that case the indictment charged advocating terrorism "by word of mouth" as a method of political reform and assembly for the purpose of such advocacy. We held that neither advocacy nor assembly in order to advocate political action may be made punishable.

Brandenburg, however, is of no help to these petitioners. For while some of the counts embrace only advocacy or acts which fall within its penumbra, still others are in the field of activities far removed from the protection of the First Amendment. There is a question concerning some of the overt acts—whether, as I asked in my dissent in *Epton* v. *New York*, 390 U. S. 29, 30, a constitutionally protected right such as speech or assembly may be used as an overt act in furtherance of a conspiracy. But other overt acts relate to the acquisition of weapons, gun powder, and the like, and the storing of gasoline to start fires. Persuasion by such means plainly has no First Amendment protection.

It therefore cannot be said that the cases against Samuels and Fernandez are palpably unconstitutional. It is for the state courts to preserve such First Amendment rights as may be involved here. Certainly by sifting out the chaff from the charges through motions to strike, instructions to the jury, and other procedural devices violence had no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of "advocacy."

SUPREME COURT OF THE UNITED STATES

Nos. 7 and 9.—October Term, 1970

George Samuels et al., Appellants, 7 *v.* Thomas J. Mackell, District Attorney, et al. Fred Fernandez, Appellant, 9 *v.* Thomas J. Mackell, District Attorney, et al.	On Appeals From the United States District Court for the Southern District of New York.

[February 23, 1971]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, concurring in the result.

I agree that the judgment of the District Court should be affirmed. All the appellants had been indicted for violation of the New York Criminal Anarchy Law before their suit in federal court was filed. They have not alleged facts amounting to bad faith harassment. Therefore, neither a declaratory judgment nor an injunction would be proper. *Perez* v. *Ledesma, post.* (Opinion of Brennan, J.)